Supreme Court, U.S.
FILED

No. 09-701

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In The

Supreme Court of the United States

ALLRITE SHEETMETAL, INC.,
an Illinois corporation,

Petitioner,

v.

BANK OF COMMERCE,
an Illinois state bank, and MARY LOU CARTER
a/k/a MARY LOUISE CARTER,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. ***Whether The State Court Was Bound By The Fourteenth And Sixth Amendments To Provide Allrite Due Process Of Law Including Right To Confrontation, The Right To Secure Evidence And To Cross-Examine Three Lawyers Who Represented The Defendant Mary Carter ("Carter") And Who Were The Only Authors Of The Critical Documents Upon Which Finding Of Facts And The Judgment Of The Trial Court Was Based. If They Had Provided Evidence And Testified The Result In That Court Would Have Been Different.***

These three lawyer witnesses were the actors who performed each act relied upon by the trial court in rendering judgment in favor of the bank and Carter with regards to the subject Letter of Credit, Messrs. Richman, Mendelsohn and Marks.

Kenneth Richman was the attorney who negotiated the subject transaction between Allrite and Carter's predecessor. He was also the draftsman of the Letter of Credit in issue. He was the author of what was ruled to be the notice of default which only related to two months, i.e., September and October, 2004, where he asked for information to determine the "sum then due," but which notice of default was construed by the trial court to cover a 27 month anticipatory default which time had not past at the time of presentation. Had he been subject to adverse

QUESTIONS PRESENTED FOR REVIEW – Continued

cross-examination it is believed he would have testified he had no knowledge of any business with groups of prior Grove customers or any sales by Allrite to any of them. It is believed that he would testify that notice for September and October, 2004 was the sole notice of default served upon Allrite.

Alexander Marks and Frederic Mendelsohn were additional lawyers for Carter, the draftsmen of the demand letter furnished to the Bank of Commerce to pay on the subject Letter of Credit and whose testimony it is believed would have established they had no factual basis for determining that the sum of $143,000.00 was "then due" because of sales to former Grove customers. No other direct evidence was received in the record below. It is believed that had Marks and Mendelsohn been subject to cross-examination they would have testified to the contrary to the court's finding that they had no communication with any former customers and had no knowledge of sales by Allrite to them.

The trial court on June 12, 2007 upon the motion of counsel for Carter quashed the subpoenas for their pre-trial deposition testimony and entered an order which provided *inter alia* " . . . Messrs. Richman, Marks and Mendelsohn are barred from testifying or giving any evidence in this cause. The referenced subpoenas are quashed."

QUESTIONS PRESENTED FOR REVIEW – Continued

That order was highly prejudicial to Allrite's ability to fairly present the evidence and we believe changed the outcome of the trial.

In *Washington v. Texas,* 388 U.S. 14, 19 (1967), the court said:

> The right to offer the testimony witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defense version of the facts as well as the prosecutions to the jury, so it may decide where the truth lies. . . .

At footnote 6 the court said: "[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the states by the Fourteenth Amendment citing *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)."

Greene v. McElroy, 360 U.S. 474 (1959) in that civil suit, it was held to be a denial of substantive due process in denying "the safeguards of confrontation and cross-examination."

The trial court in denying Allrite the ability to put on the evidence of Richman, the draftsman of the subject Letter of Credit, the Consulting Agreement, and the notice with regards to the September and October of 2004 claims for payment denied Allrite due process. Due process required the testimony of Mendelsohn and Marks who presented the drafts to

QUESTIONS PRESENTED FOR REVIEW – Continued

the Bank of Commerce with the "estimate or guess estimate" of the $143,000 figure used by them in the draft presented to the bank; the trial judge determined same being the sum then due.

Allrite was denied the right to confront the witnesses against it. It was denied due process of law. With regards to due process right of confrontation and case examination see *Briscoe v. Virginia*, ___ U.S. ___ (2009) (07-11191) now set for oral argument January 11, 2010 at 10:00 a.m. writ granted on the issue of right to confrontation.

In *Mendez Diaz v. Mass,* 557 U.S. ___ (2009) (07-591) the court held due process required confrontation and the right to cross-examination. The constitutional issues raised there are related to the constitutional issues raised here.

2. ***Whether the Decisions Of The Illinois Courts Below Are In Direct Conflict With The Decision Of This Court On An Important Federal Question Concerning Commerce And The Negotiation Of Letters Of Credit In Commerce.***

Since the financial crisis in this country, the use of letters of credit in worldwide trade has exploded. This is because businesses want to minimize risk in unstable markets.

QUESTIONS PRESENTED FOR REVIEW – Continued

In accordance with Table 1260 U.S. International Trade and Business Services as published by the U.S. Census Bureau most recent annual revision Series FT-900 (07-04) and previous reports, goods and services exported from the United States were $1,645,726,000.000.00 (goods $819,375,000,000.00) total United States imports in 2007 were goods and services of $2,345,983,000,000.00 (goods $1,967,853,000,000.00).

A substantial portion of those transactions were accomplished by the use of letters of credit. It is appropriate that this Court put to rest this recent attack by the Illinois courts on its prior holdings with regards to the necessity of strict compliance as opposed to "substantial compliance" in the presentation of documents. This determination of substantial compliance as determined by the trial court here, as affirmed by the Illinois Appellate Court in the order affirming the decision of the trial court and the Illinois Supreme Court which denied Allrite's petition for leave to appeal should be reversed.

Five years ago the Department of Commerce estimated more than 14% of international transaction involved the use of letters of credit (Documentary Credit-World February 2006).

This Court has consistently required "strict compliance" with the Letter of Credit requirements

QUESTIONS PRESENTED FOR REVIEW – Continued

before the issuer may pay same. In *Harrison Fortlage*, 162 U.S. 57, 63 (1896), the court said:

> The court is not at liberty either to disregard words used by the parties descriptive of the subject matter or of any material incident or to insert words which the parties have not made use of.

The case here involved a draft drawn by defendant Carter through her attorney Mendelsohn on the defendant Bank of Commerce against the Letter of Credit which provided that Carter can only draw for the "sums then due."

That fact is that the $143,495 claimed by Carter in the May 2005 draft drawn on the bank had anticipated that that sum might become due two years later by the year 2007.

The prior rulings of this Court and of other courts throughout the nation, has been that in the case of letters of credit there must be strict compliance with the words used. The courts below erred in permitting "substantial compliance" with the terms of the Letter of Credit, and created rights in Carter that were outside of the contract constituting the Letter of Credit.

The prior decisions of this Court were called to the attention of the trial court, the Illinois Appellate Court and the Illinois Supreme Court, none of which

QUESTIONS PRESENTED FOR REVIEW – Continued

accepted the rule of law previously announced by this Court.

The question is whether under the due process requirements of the Fourteenth Amendment, and the supremacy provisions of Article VI of the Constitution, Allrite was entitled to have the benefit of these legal rulings as to the law covering letters of credit which have stood unreversed and enforced by this Court for more than 100 years.

Section 810 ILCS 5-108 (a) requires the bank to honor a presentation " . . . [that] appears on its face strictly to comply with the terms and conditions of the Letter of Credit . . . unless otherwise agreed with the applicant [Allrite] an issuer [the bank] shall dishonor a presentation that does not appear so to comply."

The May 17, 2005, June 1, 2005, and May 12, 2006, drafts by Mendelsohn and Marks, did not state that the draw was "an estimate" of the sum due. It was not truthful. It said "under the terms of the Letter of Credit Mr. Carter is due $143,495.28.

A compliant draft would be truthful.

The defendant Carter's *Response of* ***January 24, 2006****, to Plaintiff's Motion to Require Mary Carter to Complete Ordinary Discovery as Previously Served upon her* filed with the court, Carter attempted to

QUESTIONS PRESENTED FOR REVIEW – Continued

finesse the prior unconditional representation described above. At paragraph 3 of that document, Carter's counsel said that Mendelsohn's draw:

> . . . for payment of approximately $143,000, which is based upon the *estimated damages* from plaintiff's breach of the agreement. (Emphasis added.)

That response was signed by counsel pursuant to Illinois Supreme Court Rule 137 and constitutes a binding and conclusive judicial admission. (*Board of Education of Township High School District No. 205, Cook County v. Faculty Association of District 205,* 120 Ill. App. 3d 930, 76 Ill. Dec. 363, 458 N.E.2d 1017 (1983)).

The May 12, 2006 draft (the third draft presented a year later) which was the first draft was accompanied by the mandatory original Letter of Credit was made five months after counsel's initial judicial admission that $143,495.28 was not the sum due but only an estimate of that sum based on a two year anticipatory breach of a consulting agreement. The Consulting Agreement which was not incorporated in the Letter of Credit, is referred to therein.

Section 3(c) of the consulting Agreement says that:

> Upon the failure of Corporation to pay any sums due hereunder and continuation of

QUESTIONS PRESENTED FOR REVIEW – Continued

such failure for ten business days following Consultant's written notice thereof specifying the nature of the failure of performance, Consultant is hereby granted the right to draw on such letter of credit for the *full amount then due. In the event of any such draw against such Letter of Credit, the face amount of the Letter of Credit shall be restored to this original $150,000 level* (or then applicable level of less than $150,000) within thirty (30) days of any such draw. (Emphasis supplied.)

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Allrite Sheetmetal, Inc., an Illinois corporation, the petitioner and appellant pursuant to Rule 14.1(b), the Bank of Commerce, an Illinois state bank, and Mary Lou Carter, a/k/a Mary Louise Carter, the appellees and responding defendants. No publicly held corporation owns more than 10% of the outstanding stock of either corporation.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION AND ORDERS ENTERED IN THE CASE

The decision of the Illinois Supreme Court is not yet reported. It is *Allrite Sheetmetal, Inc., an Illinois Corporation v. Bank of Commerce, an Illinois state bank and Mary Lou Carter a/k/a Mary Louise Carter*, defendant. The petition for leave to appeal to that court was denied on September 30, 2009. That order is included as Appendix page 49.

The order of the Illinois Appellate Court, First District is not reported. It bears the same caption as in the Illinois Supreme Court and was an order entered pursuant to Illinois Supreme Court Rule 23 as a non-published order. It is included as Appendix page 1.

The decisions of the trial court in the same case caption 05 CH 09623 in the Chancery Division of the Circuit Court of Cook County, Illinois including the post-trial motion, Appendix page 7, and the order denying said motion, Appendix page 45.

The order of June 12, 2006 and the order denying rehearing barring evidence from Messrs. Richman, Mendelsohn and Marks, Carter's lawyers is included as Appendix page 47.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Supreme Court of Illinois issued its decision on September 30, 2009 denying petitioner's application for leave to appeal to that court. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(a). The final decision of the Illinois courts below should be reviewed on the basis that the due process clause of the Fourteenth Amendment, the Fifth Amendment, Article VI of the Constitution form the basis of this petition for a *writ of certiorari*. The Fourteenth Amendment bars the states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV.

See *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(810 ILCS (Illinois Compiled Statutes) 5/5/-108) (UCC)

Sec. 5-108. Issuer's rights and obligations.

(1) Except as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5-1213 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(810 ILCS 5/5-109) (UCC)

Sec. 5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant.

1. The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored

its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

2. the issuer, acting in good faith may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

1. the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

2. a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

3. all of the conditions to entitle a person to the relief under the law of this state have been met; and

4. on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

(810 ILCS 5/5-110) (UCC)

Sec. 5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

1. To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in Section 5-109(a); and

2. to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit. . . .

Article VI of the U.S. Constitution

This Constitution, and the laws of the United States shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

Allrite was the applicant of the Bank of Commerce for the subject letter of credit. It was the petitioner in a Chapter 7 proceeding in the U.S. Bankruptcy Court for the Northern District of Illinois. The bankruptcy trustee of that court has no interest in this proceeding.

Grove Metal Fabricating was an Illinois corporation ("Grove") which was in a similar business as Allrite. It sold all of its assets to Allrite pursuant to a written contract prepared by its lawyer Richman. The defendant Carter is the widow of Gordon Carter, deceased, the owner of the shares of Grove. The Bank of Commerce is an Illinois state bank and is the issuer of the subject standby letter of credit. Frederic Mendelsohn, Kenneth Richman, and Alex Marks are lawyers and are the attorneys for Carter. The three of them were Carter's agents in presenting to the bank the claim made under the standby letter of credit.

The Relevant Chronology

1 9/19/03 Grove Metal Fabricators Inc. whose shares were owned by Gordon Carter entered into an asset purchase agreement for the sale of all of its equipment and machinery and accounts

receivable to Allrite, together with a consulting agreement with Gordon Carter, individually.

2 9/24/03 Standby letter of credit in favor of Gordon Carter was issued by Bank of Commerce to secure payment under the separate consulting agreement. The letter of credit required (a) delivery of original letter of credit (b) accurate statement of the sum then due and (c) evidence of notice of failure to pay sums due under the consulting agreement.

It provided:

The Bank of Commerce
September 24, 2003

IRREVOCABLE LETTER OF CREDIT

Number 111

Beneficiary:
Gordon Carter
[Home Address Omitted]

Gentlemen:

On behalf of ALLRITE SHEET METAL, INC., as obligor, we THE BANK OF COMMERCE (hereinafter referred to as "Bank"), hereby establish an Irrevocable Letter of credit in favor of GORDON CARTER and agree to pay to Mr. Carter the aggregate amount of One Hundred [sic] Fifty Thousand Dollars ($150,000.00), upon

receipt of a written demand from Mr. Carter, ***supported by a statement that a failure of Allrite Sheet Metal, Inc. to pay sums due under the Consulting Agreement with Gordon Carter has occurred***, that Gordon Carter have given notice to Allrite Sheet Metal, Inc. with a copy of such notice and that the continuation of the failure has lasted for 10 days following he [sic] delivery of such notification.

This Letter of credit is effective September 24, 2003, and will expire at midnight September 24, 2007.

It shall be required for the beneficiary, in order to draw on the Letter of Credit, to furnish the original Letter of credit.

ATTEST. /S/ Connie Saiger	THE BANK OF COMMERCE
Title: Sr. Vice Pres.	By:/s/ Jon J. Frale, President

(Emphasis supplied.)

3 9/25/03 Allrite paid Grove in full the $340,000 contract price due under its asset purchase agreement including the customer list delivered to Allrite by Grove Metal Fabricators.

4 9/25/03 Gordon Carter individually entered into a consulting and non-compete

agreement with Allrite. The agreement provided *inter alia*:

> 3. (a) . . . *Corporation shall pay to Consultant [Carter] a consulting fee equal to four percent (4%) of "Grove Revenue." "Grove Revenue" means gross receipts* ***paid*** *to the Corporation [Allrite] from this date through November 30, 2007 by the entities listed on Schedule 1* attached to this Agreement and all affiliates, subsidiaries, parent corporations, and successors to the business of the entities so listed. . . .

(Emphasis supplied.)

5	4/11/04	*Gordon Carter died. He did not designate in writing any beneficiary to the consulting agreement.*
6	8/31/04	Allrite Sheetmetal, Inc., closed its doors. It has made no sales of any product or service to any former customers of Grove Metal Fabricators or to anyone else after August 31, 2004. It went out of business. The plant was vacated.
7	10/19/04	Kenneth Richman (attorney for Carter) wrote to Allrite on behalf of "Mr. Carter's estate" for consulting fees earned in September and October 2004. No "sum due" was stated.

8 4/21/04 Frederic Mendelsohn, Carter's lawyer, advised counsel for Allrite with regard to Gordon Carter's estate:

> . . . we advise that because there were no significant assets outside of Gordon's trust or otherwise not subject to probate, no small estate affidavit or letters of office were prepared.

9 5/17/05 Mendelsohn wrote the Bank of Commerce. At paragraph 2 of the letter he stated:

> Please consider this letter our request for funding and/or draw upon the Letter of Credit *by the Beneficiary* per the terms of the Letter of Credit. *Mr. Carter sent his Notice* of Default to your applicant, Allrite Sheet Metal, Inc. as to the obligations secured by the Letter of Credit *on October 19, 2004*, advising that the underlying Agreement had been breached by non-payment. The breach was never cured, and Allrite made no subsequent payment to Mr. Carter and/or his Estate. *Under the Letter of Credit, Mr. Carter is due $143,495.28.*

(Emphasis supplied.)

		Though mandatory, Mendelsohn did not deliver the original letter of credit to the Bank.
10	6/1/05	Alexander D. Marks, a lawyer for Carter, made a second demand upon the Bank and stated: "Under the letter of credit, Mr. Carter is due $143,495.28." He also did not deliver to the bank the mandatory original letter of credit.
11	6/7/05	The instant suit was filed by Allrite for injunction against Bank of Commerce to restrain payment on the letter of credit.
12	7/8/05	In lieu of a preliminary injunction a Status quo order was entered pursuant to stipulation in open court by all parties, *to wit:* Mary Carter, Bank of Commerce and Allrite. Parties agreed to maintain the status quo subject to further order of Court. Court's order accepted the stipulation and the court, itself, added a modification which was agreed to by all the parties to the terms "Mary Carter shall not attempt to draw on the letter of credit until further order of Court."
13	1/24/06	Pleading filed in this proceeding constituting a judicial admission by Carter's attorney of record that the claim of $143,495.28 was for

		"estimated damages," but not for the precise sum claimed to be due from the bank. Response by Carter filed 1/24/06 . . . " . . . to plaintiff's motion to require Mary Carter to complete discovery as previously served upon her."
14	5/12/06	Carter served the bank with another draft against the original letter of credit, but this time included the original letter of credit.
15	5/25/06	Allrite filed a Chapter VII petition in the U.S. Bankruptcy Court for the Northern District of Illinois (06-03073). Carter filed no claim in that proceeding. Automatic stay went into effect.
16	6/5/06	Allrite furnishes Carter with list of trial witnesses including Messrs. Richman, Mendelsohn and Marks.
17	6/12/06	Trial court barred testimony of the three fact witnesses to the transaction, Messrs. Richman, Mendelsohn and Marks.

PRIOR PRESENTMENT OF THE FEDERAL DUE PROCESS QUESTION TO THE TRIAL COURT

The ruling by the trial court denying the right to receive evidence of the testimony of Messrs. Richman,

Mendelsohn and Marks, Carter's lawyers, which is the subject order of the June 12, 2006 order denying their evidence at the trial. It was an interlocutory order for which no appeal could have been made. Allrite's second motion in this regard was denied June 26, 2006. The entire due process claim was included in the post-trial motion, Appendix page 45.

Allrite preserved this issue for appeal by reason of the objection before, during the trial and by raising the issue of denial of due process in the post-trial motion after the trial which was denied. *People v. Brown*, 267 Ill. App. 3d 528, 531, 373 N.E.2d 459, 461 (1978).

At page 5 of its opinion, Justice Tully writing for the Appellate Court stated:

> Plaintiff next raises an issue with regards to a discovery order entered by the trial court on June 12, 2006. Plaintiff failed to file a notice of appeal of the June 12, 2006 order and as such the issue is waived.

The Appellate Court while obviously considering the June 12, 2006 order misconstrued the fact that it was not a final order, was interlocutory, and was not appealable at the time it was entered. There is no dispute that Allrite had raised the issue with regards to that order, both in the trial court and in the post-trial motion and again in the Illinois Appellate Court.

The issue of the testimony of Richman, Marks and Mendelsohn was again raised at page 11 of the

Petition for Rehearing of Allrite made to the Appellate Court.

Justice Tully asserted on page 5 of the Appellate Court's order that "the issue was waived." Allrite said at p. 12 of the petition for rehearing:

> The question of due process of law and the rights of litigants are before the court.

The findings of fact made by the trial court are repleat with references to the "evidence" of Messrs. Richman, Marks and Mendelsohn and their evidence explaining the basis for the ultimate determination finding the facts and issue in favor of Carter and against Allrite. (Appendix page 7). None of those witnesses were subjected to cross-examination pursuant to Allrite's right to due process of law. This was to Allrite's prejudice. Had the available evidence from those three been taken, the result would have been different.

For example, finding 72 speaks of Richman's sending a default notice on October 19, 2004.

Finding 73 goes to Richman's financial records.[1]

Finding 75 without Richman's testimony makes the finding that Richman did not receive a response to the October 19 letter.

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[1] References are to Appendix page 7, the trial court's findings of fact and conclusions of law and Appendix page 45, the post-trial motion.

Finding 76 speaks of a conversation between Mendelsohn, Carter's lawyer and Carter's accountant. The fact at issue was whether attorney Ken Richman requested the documents to calculate the sum due. He would have testified no. The accountant at his discovery deposition testified that he did not have such a conversation.

Finding 77 speaks of the accountant forwarding to Mendelsohn the documents regarding the payments by Allrite.

Finding 78 is based upon the letter from Mendelsohn regarding the payments.

Finding 80 references Mendelsohn's making a demand on behalf of Carter by presenting the May 17, 2005 draw request for $143,495.28 to the bank.

Finding 86 on the basis of written communications made by Alexander Marks who was working together with Richman and Mendelsohn followed up with the bank with regards to the draw request.

While critical factual findings were made by the trial judge based upon writings and hearsay testimony as to the actions of the three lawyers, the trial court in the denial of due process has denied Allrite their evidence and rights to cross examination of each of them without due process of law.

A good example of how Mendelsohn testified

(TR 00043-46) the plaintiff renewed an objection at Page 156 during the examination of Carter's accountant Kwiat by Mendelsohn.

By Mendelson:

Q. Did you have any discussions with me, sir, generally about the methology to use to figure out what the number is?

A. Did I have –

Q. Discussions with me about generally, not specifically but generally about the methology to employ that either lawyers could use to crunch numbers?

A. Yes, I did.

Q. Did you have any understanding as you sit here, based on our conversations, where the $143,495 number comes from?

A. Yes, I do.

Q. Can you tell the Court what that is?

Mr. Mantynband: Objection, your Honor. We have already covered that he had no recollection of those conversations. The examiner's led the witness down this line and the witness has already testified that prior to May 17, 2005 he didn't have those conversations, and Mr. Mendelsohn is trying

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to extract himself to try and justify what he sent through the mail over his signature,

that the amount then due as specified in the letter of credit was $143,000 and some-odd, and your Honor has already established that their expert can't testify to that because he had no recollection of those conversations, despite the (article) (sic) leading the witness to this point trying to create the illusion that such a conversation in fact occurred prior to sending the demand to the Bank of Commerce

The Court: What's your response to that?

Mr. Mendelsohn: I'm not sure what the objection is, your Honor.

The witness testified on both direct and explanatory examination that he had conversations with me, he couldn't recall the number of conversations, that was the basis for the impeachment. The question pending to the witness is does he have an understanding of how that number came to be

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what that number presents. I think it's a completely legitimate question.

The Court: If you put the question that way, I'll allow it. So if you can rephrase the question.

Mr. Mendelsohn:

Q. Do you have an understanding, Mr. Kwiat, as to where the $143,495 number came from?

A. Yes, I do. I asked how he came up with that.

Mr. Mantynband: Objection, your Honor. A conversation between your expert witness and their lawyer and being offered as evidence.

The Court: You know, I made a ruling sometime ago in this case that the attorneys who presented the draw request were not going to be deposed or weren't going to be witnesses in this case, but that was based on the assertion to me that this figure could be independently justified.

You [Mendelsohn] I think are coming very close to making yourself a witness in this case.

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So, you know, I'm going to sustain the objection. I think that I can't allow this area of inquiry and yet maintain in place the order that I have strictly enforced, and that is that the attorneys act as witnesses.

* * *

The Court: Counsel, really what I want – agree with the plaintiff on this.

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You know what I want you to do here is I want you to ask this witness if he could

> justify this number, that's it. I really don't want to have – I don't want to hear about his conversation –
>
> * * *
>
> Page 161
>
> Exam by Allrite Counsel:
>
> Q. At the deposition when I asked you similar questions concerning how – if you could calculate $143,495, do you recall that you couldn't?
>
> A. That's correct.
>
> Q. And only since your deposition in October of 2005, that you had conversations with Mr. Mendelsohn, that you now want to testify as to that numbers, is that correct?
>
> A. That's after that point, yes, I did.

A continuing objection need not be repeated; see *Nav v. Rainbo Tyre Service*, 123 Ill. App. 3d 585, 589-90 (1984), citing with approval *Chicago Union Traction C. v. Lauth*, 216 Ill. 176, 180 (1906).[2]

The Critical Legal Conclusion by the Trial Court Departing from "Strict Compliance"

> The court here further finds that nothing in the nature of a letter of credit precludes a draw request being based on such a

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[2] Due process of law equals "fairness."

> calculation, especially under these circumstances as issues and the courts are not to be drawn into dispute over the exact amount due pursuant to the underlying transaction.

The foregoing examination without any cross-examination of the three lawyers who had first hand knowledge forged a substantial part of the court's finding abandoning "strict compliance" this court's earlier ruling notwithstanding.

Since the beginning of the nation decisions of the United States Supreme Court are precedent and *unquestionably* "arising under the Constitution." That is to say in limited purposes here the question as to what the Constitution means is as is articulated by this Court in the referenced case *Harrison v. Fortlage,* 161 U.S. 57 (1896).

It clearly qualified as a case decided under Article III, Section 2 of the Constitution and historically included in the decisions of this Court and binding under Article VI as being "binding on 'the judges in every state' anything in the Constitution or laws of any state to the contrary notwithstanding." The decision of the Illinois courts could not have been made if the *Harrison, supra* decision had been followed; *Kern-Limerick v. Scurlock*, 347 U.S. 110, 121 (1954).

The issue of Fourteenth Amendment due process is an issue "under the Constitution" in every "case" where a state court should decline to follow any Supreme Court decision as a precedent. In cases

involving such a question would be cases arising under the Constitution and, if in "law" or "equity" would be within the mandatory categories of the judicial article. (Politics and the Constitution, University of Chicago Press (Pages 666-7) (1953)). The due "process" guarantees are not limited to criminal cases.

With no affirmative pleading on file by Carter, the finding and judgment of the trial court directed the bank to pay to Carter the $143,000 which was the subject of Allrite's application for an injunction. The Fourteenth Amendment and for that matter, also the Fifth Amendment to the Constitution, are applicable in cases involving property which is the subject matter of this entire proceeding.

In a claim made under *Brady v. Maryland*, 373 U.S. 83 (1963), this Court in *Cone v. Beal, Warden*, 556 U.S. ___ (07-1114) April 28, 2009, held that if a state suppresses evidence favorable to an accused that is material to guilt or punishment the state violates the defendant's rights to due process under the Fourteenth Amendment.

Is a citizen in a civil case not equally entitled to due process of the law under the Fourteenth Amendment?

UNDER THE FOURTEENTH AMENDMENT, DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAWS IS GUARANTEED. IT FORBIDS ALL INVIDIOUS DISCRIMINATION

It requires that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts or the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts. *Barbier v. Connolly,* 113 U.S. 27, 31 (1885). This is substantive due process of law.

The Letter of Credit involved in this proceeding was a standby Letter of Credit which is a security device whereby the bank issuing the Letter of Credit agrees to pay a Letter of Credit beneficiary, in this instance, Carter, upon the presentation of all of the documents conforming to the requirements of the Letter of Credit. The statute created a warranty to both the bank and Allrite that the contents of the draft were true. 810 ILCS 5-110.

The standby Letter of Credit requires the presentation of documents that evidence of the default in payment of sum then due in the underlying transaction between Carter, the Letter of Credit beneficiary, and Allrite, the party that has arranged for the issuance of the Letter of Credit.

One of the central tenants of this regularly used device for international trade and credit support here within the United States is the doctrine of strict compliance with the terms of the Letter of Credit. That doctrine requires the Letter of Credit beneficiary to comply precisely and truthfully with all the requirements of the Letter of Credit. That means presenting of all the documents required by and making sure the presented documents strictly comply with the document requirements of the Letter of Credit.

Documents that are almost the same simply will not cut it. Other Illinois authorities such as *Auto Insurance v. Southside Trust and Savings,* 176 Ill. App. 3d 303, 531 N.E.2d 146 (1988) were in essence overruled in the same fashion as was this Court's ruling in *Harrison v. Fortlage,* 161 U.S. 57 (1986) by the order of the Illinois Appellate Court.

Here, lawyer Mendelsohn acting on behalf of his client, Carter, wrote a letter to the bank requesting a payment of an amount within the parameters of the Letter of Credit itself, but not truthfully setting forth the amount to be ***then due.*** Immediately after the presentation, Allrite filed an action in the state court to enjoin the payment under the Letter of Credit for the sum not then due.

His draft, under the law was warranted to be true.

Carter never filed suit against the bank or Allrite claiming the alleged rights to draw under the Letter

of Credit. The initial draft presented among other things did not comply with the strict requirements of presenting the original, not a copy of the Letter of Credit to the bank. The notice of default was for two months and a request by Richman to determine the sum *then* due, and not for the entire term of the consulting agreement.

The sum claimed "due" was false and not the actual "sum due" but an estimate of a sum which might become due two years in the future.

The Three Contracts

A standby Letter of Credit has come into use in many transactions as a backstop to protect the Letter of Credit beneficiary from a default in its transaction with the third party. Usually the third party is the applicant to the Letter of Credit, Allrite in this instance.

The first contract was the consulting contract between Carter and Allrite.

The second contract was the bank's agreement with the Letter of Credit applicant, Allrite to issue the Letter of Credit. The second contract includes the bank's agreement to issue the Letter of Credit, the terms of the Letter of Credit, the applicant's obligation to reimburse the bank for payments made to the beneficiary upon the presentation of conforming documents as well as the bank's charges and commissions earned in issuing the Letter of Credit and

the collateral security for the applicant's reimbursement obligation to the bank.

The third contract is the standby Letter of Credit itself that the bank in this case has issued in favor of Carter.

In the third contract which was independent from the other two Carter was required to present to the court all the documents required by the standby Letter of Credit which consisted of a truthful draft and a statement or certification of default in the underlying transaction with the Letter of Credit applicant, i.e., Allrite.

The issuing bank must pay the amount of a compliant draft to the beneficiary.

Here the documents furnished to the bank did not truthfully state "the sum due." The draft presented was a guess, an estimate of the sum which might become due in the future. It was a non-compliant document.

The central tenet of Letter of Credit laws is the principle of independence. Each of the contracts in a Letter of Credit transaction is independent of the other. In the case here, the Bank of Commerce had agreed to make payments to Carter based upon Carter's presentation of documents that made a truthful statement of the amount "then due," Allrite's obligation to reimburse the bank for that payment would be enforceable if all other requirements had been complied with.

There was no provision in the Letter of Credit contract for the payment against the Letter of Credit based upon an estimate of the amount due and the amount anticipated to become due. The only notice provided to Allrite by Carter's lawyer, Richman was the issue of payments for September and October of 2005 had not been made. No other notice was ever provided either to Allrite or to the bank to support the draft which was required to be in strict compliance with the terms of the Letter of Credit.

This petition for the issuance of *writ of certiorari* should be an ideal vehicle for this Court to resolve what may be a conflict among lower courts with regards to the current issue concerning strict compliance with standby Letter of Credit conflicts previously ruled on by this Court in the case here in conflict with the subject ruling in the State of Illinois.

The matter is not unimportant. The text writers including John F. Dolan, one of the leading authorities on the law of letters of credit has written, Volume 15, Dcinsight, page 4, 2009.

> A former U.S. Supreme Court Justice writing for a circuit court of appeals observed that documentary compliance "is not like pitching horseshoes. No points are awarded for being close." Any notion of "reasonableness" in the document examination sitting, these courts held, would corrode the predictability and certainly that the letter of credit – a quick, low-cost, bank product – demands.

Professor Dolan referred to the disappointing record stating:

> Regrettably, both in the U.S. and in other common law jurisdictions more than a few courts have failed to apply international standard banking practice or have failed to apply any standards other than their own "feelings."

The court in *Tradax Coral Petroleum Inc. v. Coral Petroleum, Inc.*, 878 F.2d 830 CCA 5 (1989) in a very informative and sweeping opinion noted:

> The terms of the credit are . . . impossible to perform . . . Tradax argues that the district court should have construed the letter to avoid this impossibility . . . there does not appear to be much case law concerning this issue, at least one commentator in the field of letter of credit law has suggested and that impossibility does not excuse strict compliance with the terms of the credit.

The court noted in that case:

> "The Strict Compliance Rule has the intended salutary effect of requiring the beneficiary to review the credit to be certain that he can comply with it. That inquiry, which permits the beneficiary to verify that the credit complies with the underlying contract, also permits him to make timely requests for amendments . . . " citing with approval the text, J. F. Dolan, The Law of Letters of Credit page 6.03. . . .

The Strict Compliance Rule clearly did not authorize Carter to present to the bank a draft that exceeded any amount which could possibly be due under the terms of the standby Letter of Credit and a two month claim notice of default served thereunder. It certainly did not authorize Carter anticipating payments that might become due two years in the future, i.e., 2007.

CONCLUSION

The requested writ should issue.

Respectfully submitted,

ALLRITE SHEETMETAL, INC.

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FIFTH DIVISION
APRIL 10, 2009

No. 1-07-2873

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLRITE SHEETMETAL, INC., an Illinois Corporation, Plaintiff-Appellant, v. BANK OF COMMERCE and MARY LOU CARTER a/k/a MARY LOUISE CARTER, Defendant-Appellee.	Circuit Court of Cook County. No. 05 CH 9623 Honorable Stuart Palmer, Judge Presiding.

ORDER

Plaintiff, Allrite Sheetmetal, Inc., filed suit seeking to enjoin Defendant Bank of Commerce (Defendant Bank) from honoring a draw request on a letter of credit made by Defendant Mary Louise Carter (Defendant Carter) and to prevent Defendant Carter from making any further draw requests. Following a bench trial, the circuit court entered an order denying Plaintiff's request for injunctive relief and ordering Defendant Bank to pay Defendant Carter the full amount requested in the draw. Plaintiff appeals that order.

Facts

On September 9, 2003, Grove Metal Fabricators (Grove Metal) and Allrite Sheetmetal entered into an Asset Purchase Agreement and Consulting Agreement. The Asset Purchase Agreement provided that Allrite Sheetmetal would purchase the equipment, inventory and customer and prospect lists of Grove Metal. Allrite Sheetmetal paid $340,000 for the equipment and inventory. Under the terms of the Consulting Agreement, Allrite was to pay to Gordon Carter 4% of the revenue realized from Grove Metal customers each month for seven years. Gordon Carter was the owner of Grove Metal. The revenue was defined as "gross receipts paid to the Corporation from this date through November 30, 2007 by the entities listed on Schedule I attached to this Agreement and all affiliates, subsidiaries, parent corporations, and successors to the business of the entities so listed." The Consulting Agreement further provided that in the event of Gordon Carter's death prior to the end of the term of the Agreement, payments would be made to the beneficiary designated in writing by Gordon Carter. Allrite Sheetmetal agreed to secure its obligations under the Consulting Agreement with an irrevocable letter of credit in the amount of $150,000.

The Letter of Credit was issued by The Bank of Commerce in favor of Gordon Carter.

Shortly after the closing, in November 2003, Allrite Sheetmetal sold Grove Metal's equipment at auction. On April 11, 2004, Gordon Carter died.

Carter's Trust named his wife, Mary Carter, as successor trustee and his will appointed Mary Carter executrix of his estate.

Pursuant to the Consulting Agreement, Allrite Sheetmetal made payments totaling $39,732.60 for invoices through June 9, 2004. The last payment received by Mary Carter was on August 26, 2004. No further payments have been made.

In August or September 2004, Allrite Sheetmetal sold its assets to Agivil, Inc., which does business as "Allrite Fabricating", for more than $1.1 million. The money was paid to LaSalle National Bank to satisfy a loan to Allrite Sheetmetal which was personally guaranteed by Wayne Filosa and Joe Marchese. Wayne Filosa (Filosa) was the president of Allrite Sheetmetal for at least twenty years prior to September 2004. Filosa and Joe Marchese were equal co-owners of Allrite Sheetmetal. The owner and president of Allrite Fabricating is Nick Marchese, the son of Joe Marchese.

On October 19, 2004, Kenneth Richman, an attorney for Grove Metal and the Carters, sent Allrite Sheetmetal a default notice of failure to make payments under the Consulting Agreement. Richman requested that Allrite Sheetmetal produce all financial records relating to the sales made by it and any successor of its business. Allrite Sheetmetal failed to produce any documents.

In April, 2005, an attorney for Grove Metal sent a letter to counsel for Allrite Sheetmetal regarding

payments owed under the Consulting Agreement. Plaintiff responded that its position was that Allrite Sheetmetal owed $8,525.72.

On May 17, 2005, Mary Carter, through her attorneys, made a demand for draw on the Letter of Credit in the amount of $143,495.28 to The Bank of Commerce. The amount of the draw request was based upon a per diem calculation over the four-year payment period. The following day Filosa sent two letters to The Bank of Commerce requesting that it dishonor the draw request.

In June, 2005, Allrite Sheetmetal filed a lawsuit seeking to enjoin The Bank of Commerce from honoring the draw request and to enjoin Mary Carter from making a draw request under the Letter of Credit. Following a trial, the circuit court found that Allrite Sheetmetal failed to prove the elements necessary to obtain injunctive relief and ordered The Bank of Commerce to pay Defendant Carter the full amount requested in the draw request.

Discussion

On appeal, Plaintiff first contends the evidence clearly proved that Mary Carter committed egregious fraud in the presentation of drafts to the Bank in the amount of $143,495.28. Plaintiff asserts that there was no *bona fide* basis that the amount requested represented the sum due under the Consulting Agreement.

Section 5-109 of the Illinois Uniform Commercial Code allows an applicant of a letter of credit to seek injunctive relief when "a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant." 810 ILCS 5/5-109. Plaintiff maintains that the use of a per diem calculation based upon the amount owed under the term of the Consulting Agreement constitutes fraud as a matter of law.

We agree with the circuit court that the draw request was not fraudulent and was, by necessity, based on a per diem calculation. The evidence showed that Larry Kwiat, the accountant for Grove Metal and the Carters, made repeated attempts to quantify the exact amount of revenue being generated by former Grove Metal customers. His efforts were repeatedly frustrated by Filosa and Joe Marchese. The evidence further showed that Mary Carter acted in good faith. At the time the draw request was made, Mary Carter believed that Allrite Sheetmetal had wrongfully attempted to avoid its obligations under the Consulting Agreement by a less than arms-length transfer of Allrite Sheetmetal's assets (specifically the Grove Metal client list) to Allrite Fabricating. That belief is supported by the evidence. The cases cited by Plaintiff do not support its position.

The record supports the finding that Mary Carter acted in good faith when requesting a $143,495.28 draw on the Letter of Credit. Further, we find the Plaintiff has failed to present any evidence of fraud.

Next, Plaintiff contends that Mary Carter's initial draw request failed to strictly comply with the terms of the Letter of Credit because it did not contain the original Letter of Credit and a copy of the default notice. Plaintiff asserts that because of this the circuit court should have enjoined the honoring of the draw request.

This argument is moot as Mary Carter supplemented her initial draw request by providing the necessary documents which are now in The Bank of Commerce file.

Plaintiff next raises an issue in regards to a discovery order entered by the trial court on June 12, 2006. Plaintiff failed to file a notice of appeal of the June 12, 2006 order and as such, the issue is waived.

Plaintiff next asserts that certain conclusions set forth by the trial court are not justified. Our review of the record shows that the findings made by the trial court as well as the conclusions derived therefrom are supported by the evidence presented at trial.

For the foregoing reasons, the August 15, 2007 Order and the October 19, 2007 Order of the circuit court are affirmed.

Affirmed.

TULLY, J., with O'MARA FROSSARD and TOOMIN, JJ., concurring.

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT,
CHANCERY DIVISION**

ALLRITE SHEETMETAL, INC., an Illinois Corporation, Plaintiff, v. BANK OF COMMERCE, an Illinois state bank, and MARY LOU CARTER, a/k/a MARY LOUISE CARTER, Defendants.	)	Case No. 05 CH 9623

Memorandum Opinion and Order

(Entered Aug. 15, 2007)

This matter coming before the Court for trial upon the merits of the pleadings, the Court having considered the testimony of the witnesses, the exhibits and the arguments of counsel, the Court hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Grove Metal Fabricators, Inc. (hereinafter "Grove Metal"), is an Illinois corporation now known as "Grove Liquidating Corporation" and previously known as "Grove Metal and Plastic Fabricators, Inc."

2. Prior to his death, Gordon Carter was the owner of Grove Metal and husband of Mary Carter.

3. Mary Carter is the widow of Gordon Carter and current owner and president of Grove Metal.

4. Allrite Sheetmetal is an Illinois corporation incorporated on April 28, 1972 and is currently in good standing.

5. Wayne Filosa (hereinafter "Filosa") is the President of Allrite Sheetmetal.

6. For at least 20 years (prior to September 2004), Filosa and Joe Marchese were equal co-owners of Allrite Sheetmetal.

7. Agivil, Inc. is an Illinois corporation incorporated in July of 2004 and does business as "Allrite Fabricating" (hereinafter, "Allrite Fabricating").

8. The owner and president of Allrite Fabricating is Nick Marchese.

9. Nicholas Marchese is the son of Joe Marchese.

10. On December 20, 1990, Gordon Carter amended and restated his prior trust agreement, dated August 27, 1981 (the "Amended Trust").

11. Under the terms of the Amended Trust, Mary Carter became the successor trustee of the Amended Trust upon Gordon Carter's death on April 11, 2004.

12. On December 20, 1990, Gordon Carter also executed a will (the "Will").

13. Under the terms of the Will, Gordon Carter appointed his wife, Mary Carter, executrix of his estate.

14. On September 9, 2003, Grove Metal sold certain of its assets to Allrite Sheetmetal including its equipment, inventory, customer list and customer base.

15. Grove Metal's customer base brought in millions of dollars of sales for Grove Metal and, specifically, Grove Metal's sales in 2003 was $1.7 million, in 2002 was $2.1 million and in 2001 was $2 million.

16. The purpose of Allrite Sheetmetal's purchase of Grove Metal was to add Grove Metal's customers to its customer base to increase its sales.

17. While Allrite Sheetmetal purchased Grove Metal's equipment and inventory, it did not need these assets because it already had the same machinery/equipment at its facility and, in fact, intended to sell the equipment at an auction after the sale took place.

18. To accomplish the sale the parties entered into an Asset Purchase Agreement and a Consulting Agreement.

19. The Asset Purchase Agreement provided that the purchase price of "Purchased Asset" (as

defined) would be the sum of the "Inventory Value" (as defined) and the Equipment Value. The "Equipment Value" was designated to be $325,000. At closing, inventory was valued at $15,000.

20. In the Asset Purchase Agreement, "Purchased Asset" was defined to include "customer and prospect lists." A Bill of Sale issued in conjunction with the closing also listed "customer and prospect lists."

21. Allrite Sheetmetal paid Grove Metal $325,000 for the equipment and $15,000 for the inventory.

22. Additionally, under the Consulting Agreement, Allrite Sheetmetal agreed to pay four percent of the "Grove Revenue" each month for a period of seven years to Gordon Carter. "Grove Revenue" was defined as "gross receipts paid to the Corporation from this date through November 30, 2007 by the entities listed on Schedule I attached to this Agreement an [sic] all affiliates, subsidiaries, parent corporations, and successors to the business of the entities so listed.

23. The Consulting Agreement does not terminate until November 30, 2007.

24. The Consulting Agreement does not contain any early termination provision in the event Allrite Sheetmetal were to sell its assets or otherwise go out of business, or any other provision stating how Allrite Sheetmetal's payment obligations would be handled in such an event.

25. Mary Carter rejected the first draft of the consulting agreement because she did not feel it protected her husband and her as to the value of Grove Metal's customer base.

26. To protect her and her husband, Mary Carter had Allrite Sheetmetal secure its obligation to make payments under the consulting agreement by entering into a letter of credit so that if Allrite Sheetmetal did not pay the full amount the Carters would be able to draw on the letter of credit.

27. Allrite Sheetmetal agreed to secure its payment obligations under the Consulting Agreement with an Irrevocable Letter of Credit in the amount of $150,000.

28. At the closing, Gordon Carter, Larry Kwiat (the accountant for Grove Metal and the Carters hereinafter "Kwiat"), Ken Richman (the counsel for Grove Metal and the Carters), Filosa (Allrite Sheetmetal's President) and Tom Wyzlowski (Allrite Sheetmetal's operation's manager) were present.

29. In addition to being present at closing, Kwiat reviewed the Asset Purchase Agreement and Consulting Agreement before the closing and had several discussions with Gordon Carter regarding the same.

30. At the time of closing, Filosa knew that Gordon Carter was not feeling well and that his illness was serious.

31. There were specific discussions at the closing, which included Filosa and Gordon Carter, that the sale of the customer base was covered by the monthly payments outlined in the Consulting Agreement and that these payments were intended for Gordon Carter's retirement and to protect his family.

32. Filosa specifically agreed at closing that he would honor the agreement to make the monthly payments under the Consulting Agreement.

33. At the closing, there were also specific discussions about the fact that Gordon Carter was not going to be able to consult or work due to his illness and that the payment obligations of Allrite Sheetmetal under the Consulting Agreement were not based upon any work or consulting by Gordon Carter.

34. At the time of closing, Filosa knew that Gordon Carter could not perform any services due to his medical condition.

35. Consistent with the discussions at the closing, the Consulting Agreement provides that such fees are earned whether or not, and to what extent, if any, Corporation requests or receives consulting services from [Gordon Carter].

36. The Consulting Agreement also provides that "[p]ayment shall be made to Consultant [Gordon Carter] or, in the event of Consultant's death prior to the end of the Term of Agreement, to such beneficiary as Consultant designates in writing."

37. Shortly after the closing and pursuant to the parties' agreement, Allrite Sheetmetal caused the Bank of Commerce to issue an Irrevocable Letter of Credit in favor of Gordon Carter.

38. The purpose of the Irrevocable Letter of Credit was to ensure payment under the Consulting Agreement.

39. The Irrevocable Letter of Credit was issued on September 24, 2003.

40. The Irrevocable Letter of Credit states:

IRREVOCABLE LETTER OF CREDIT

* * *

> On behalf of **ALLRITE SHEET-METAL, INC.** as obligor, we **THE BANK OF COMMERCE** (hereinafter referred to as "Bank"), hereby establish an Irrevocable Letter of Credit in favor of **GORDON CARTER** and agree to pay Mr. Carter the aggregate amount of One Hundred Fifty Thousand Dollars ($150,000.00), upon receipt of a written demand from Mr. Carter, supported by a statement that a failure of Allrite Sheetmetal, Inc. to pay sums due under the Consulting Agreement with Gordon Carter has occurred, that Gordon Carter has given notice to Allrite Sheetmetal, Inc. with a copy of such notice and the continuation of the failure has lasted for 10 days following the delivery of such notification.

> This Letter of Credit is effective September 24, 2003, and will expire at midnight September 24, 2007.
>
> It shall be required for the beneficiary, in order to draw on this Letter of Credit to furnish the original Letter of Credit.

41. Mary Carter understood that if Allrite Sheetmetal defaulted under the Consulting Agreement, a draw could be made under the Irrevocable Letter of Credit.

42. Shortly after the closing, in November of 2003, Allrite Sheetmetal sold Grove Metal's equipment at an auction.

43. Shortly after the auction, Kwiat contacted Tom Wyzlowski at Allrite Sheetmetal to find out about the auction and was told the equipment was sold for more than $340,000.

44. Filosa testified at trial that Allrite Sheetmetal received less than $325,000 for the Grove Metal equipment at auction but no documentation was introduced to support that testimony.

45. On April 11, 2004, Gordon Carter died.

46. On May 17, 2004, Gordon Carter's Will was filed with the Clerk of the Circuit Court, 19th Judicial District, under the cause: Will of Carter, Gordon, Case No. 04W1000225.

47. Allrite Sheetmetal made the following payments under the Consulting Agreement:

Date Received	Amount of Check
3/23/04	$12,204.43
4/05/04	$4,219.09
5/06/04	$7,644.65
6/17/04	$4,022.42
7/07/04	$3,421.85
8/05/04	$4,734.65
8/26/04	$3,484.51

Total: $39,732.60

48. The first payment received on March 23, 2004 was for invoices starting October 9, 2003.

49. The last payment received on August 26, 2004 was for invoices through June 9, 2004.

50. The total amount of payments received from Allrite Sheetmetal was $39,732.60.

51. The addition of Grove Metal's customer base to Allrite Sheetmetal's business added approximately a million dollars in sales for Allrite Sheetmetal.

52. Allrite Sheetmetal has not made any additional payments under the Consulting Agreement since the August 26, 2004 payment.

53. Allrite Sheetmetal admits that it owes another $8,525.72, which it has not paid to date, for its revenue from June 10, 2004 through August 31, 2004.

54. Allrite Sheetmetal did not introduce any documentation regarding this calculation at trial.

55. Beyond the $8,525.72, Allrite Fabricating has collected additional receivables on behalf of Allrite Sheetmetal since September of 2004.

56. Filosa, could not testify as to how much has been collected for those additional receivables and acknowledged that there may still be more receivables being collected on behalf of Allrite Sheetmetal by Allrite Fabricating.

57. In August or September of 2004, Allrite Sheetmetal sold its assets, including Grove Metal's equipment and customer base, to Allrite Fabricating for over $1.1 million.

58. Allrite Fabricating paid the $1.1 million to LaSalle National Bank to payoff Allrite Sheetmetal's loan, which was personally guaranteed by Filosa and Joe Marchese.

59. As a result of Allrite Fabricating's payment to LaSalle National Bank, Allrite Sheetmetal, Filosa and Joe Marchese were released from any further responsibility to pay anything to the bank.

60. Shortly thereafter, Mary Carter learned about the sale and that Allrite Sheetmetal sold the customer base of Grove Metal as part of that sale.

61. Mary Carter also learned from her two sons, who still have contact with prior customers of Grove Metal, that Allrite Fabricating was servicing some of Grove Metal's customers.

62. Mary Carter then contacted Kwiat, the accountant for Grove Metal and the Carters, to find out about the sale and the remaining payments owed for the customer base under the Consulting Agreement.

63. In September of 2004, Kwiat went to Allrite Sheetmetal's facilities in Franklin Park, Illinois to obtain documentation regarding amounts still owed under the Consulting Agreement.

64. While at Allrite Sheetmetal's facilities in Franklin Park, Kwiat requested copies of Allrite Sheetmetal invoices and accounting records from Mary Nunez and Filosa so he could do an audit.

65. Neither Mary Nunez nor Filosa provided Kwiat with any of the requested documents.

66. Rather, Mary Nunez told Kwiat that the requested documents were at the Addison plant where Allrite Fabricating was operating and told him to ask for Joe Marchese.

67. Joe Marchese was the prior co-owner of Allrite Sheetmetal and, based upon Mary Nunez's instruction, was apparently then working at Allrite Fabricating.

68. Filosa then told Kwiat to leave the premises.

69. Kwiat subsequently contacted Joe Marchese to request access to the invoices and accounting

records but Joe Marchese hung up the phone and would not talk to him.

70. Kwiat made about a dozen calls to Allrite Fabricating and, specifically, Joe Marchese, requesting the invoices and accounting records but never received any response or access to the requested documents.

71. In September of 2004, Kwiat personally contacted Grove Metal customers and found out that they were buying products from Allrite Fabricating in Addison, Illinois.

72. On October 19, 2004, counsel for Gordon Carter, Mary Carter and Grove Metal, Kenneth Richman, sent Allrite Sheetmetal a default notice for failure to make payments under the Consulting Agreement.

73. In the October 19, 2004 letter, Mr. Richman requested that Allrite Sheetmetal produce all financial records relating to the sales made by Allrite Sheetmetal, and any successor and/or assignee of its business, within ten business days.

74. The October 19, 2004 letter was served on Allrite Sheetmetal and, specifically Mary Nunez, by federal express on October 20, 2004.

75. Allrite Sheetmetal did not produce any documents or otherwise respond to Mr. Richman's October 19, 2004 letter.

76. In March 2005, Kwiat was contacted by Frederic Mendelsohn, another attorney at Ken Richman's firm, who requested information and documents regarding the amounts paid by Allrite Sheetmetal.

77. By letter dated March 28, 2005, Kwiat forwarded to Frederic Mendelsohn documents regarding the payments made by Allrite Sheetmetal to Gordon Carter including a general ledger, copies of checks, adding machine tapes and copies of invoices.

78. On April 21, 2005, Frederic Mendelsohn, sent a letter to Allrite Sheetmetal's counsel, Ralph Mantynband, regarding payments owed under the Consulting Agreement and enclosing a copy of Gordon Carter's Will, Amended and Restated Trust, proof of filing the Will, and a copy of the last payment received under the Consulting Agreement.

79. In response, Mr. Mantyband [sic] advised Mr. Mendelsohn that it was Allrite Sheetmetal's position that only $8,525.72 was owed under the Consulting Agreement.

80. On May 17, 2005, Mr. Mendelsohn, on behalf of Mary Carter, made a demand for draw on the Irrevocable Letter of Credit in the amount of $143,495.28 to the Bank of Commerce (the "May 17, 2005 Draw Request").

81. Mary Carter had discussions with her counsel regarding the preparation of the May 17,

2005 Draw Request and authorized him to make the May 17, 2005 Draw Request on her behalf.

82. The May 17, 2005 Draw Request requested payment of $143,495.28 was based upon a per diem calculation over the four year payment period and was lower than the $150,000 secured by the original letter of credit.

83. Mary Carter did not initially submit the original letter of credit to the bank, instead, advised the Bank of Commerce in the May 17, 2005 Draw Request that the original would be transmitted to the Bank of Commerce as needed.

84. On May 18, 2005, Filosa sent two letters to the Bank of Commerce requesting that the Bank of Commerce dishonor the draw request made by Mary Carter, stating that (1) no one had been appointed by the court to present a draw request under the Irrevocable Letter of Credit on behalf of Gordon Carter, (2) there is no provision in the Consulting Agreement that provides for death benefits to be paid, (3) Gordon Carter was required to perform certain services under the Consulting Agreement, and only $8,252 was owed to Gordon Carter under the Consulting Agreement.

85. During a telephone conversation between Filosa and John Frale (hereinafter "Frale") in May of 2005, Frale told Filosa that the Bank of Commerce was going to have to pay in response to Mary Carter's draw request.

86. On June 1, 2005, Alexander Marks, an attorney working with Mr. Richman and Mr. Mendelsohn, sent a follow-up letter to the Bank of Commerce regarding the prior draw request.

87. On June 2, 2005, counsel for the Bank of Commerce, David Gordon, sent a letter to Allrite Sheetmetal's counsel, Ralph Mantynband, regarding Allrite Sheetmetal's objections to the draw request. (DX 19)

88. In the June 2, 2005 letter, Mr. Gordon advised Mr. Mantyband [sic] that Allrite Sheetmetal's objections in its two May 18, 2005 letters were not considered to be a basis to dishonor the draw request. Specifically, the June 2, 2005 letter addressed Allrite Sheetmetal's objections in two categories. The first contention raised by Allrite Sheetmetal was that the letter of credit expired upon Gordon Carter's death and that Defendant, Mary Carter, did not have the authority to make a claim request. This objection was rejected by the Bank of Commerce as follows:

> The Letter of Credit contains no prohibition against the succession of certain individuals to beneficiary by operation of law. Section 5-102(a)(15) of the UCC expressly includes an "executor" in the definition of a "successor of a beneficiary." 810 ILCS 5/5-101(1)(15). Further, Section 5-112, when read with Section 5-113, permits a transfer of decedent's rights to an executor even without express provisions for the transfer of the letter of credit. 810 ILCS 5/5-112-5/5-113.

> Assuming that Ms. Carter presents satisfactory evidence of her appointment as executrix under the Will of the Beneficiary, we are unaware of any reason why she would not succeed to the rights of the Beneficiary by operation of law. Ms. Carter may very well be the appropriate individual to tender a request under the letter of Credit. If you are aware of any facts or authority to the contrary, please forward that information to us at your earliest convenience. (DX 19)

The second objection raised by the Applicant (Allrite Sheetmetal) was that the amount demanded was not due under the underlying Consulting Agreement. This contention was also rejected by the Bank of Commerce as follows:

> The remaining concerns of the Applicant ignore the principles of autonomy that give the letter of credit its unique qualities as a swift, certain, flexible, and economically efficient payment mechanism. UCC Section 5-103(d) defines the autonomy or independence principle: "rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the insurer and the applicant and between the applicant an [sic] the beneficiary." 810 ILCS 5/5-103(d). Although not directly a statement of the

> independence principle, UCC Section 5-108(f) also sheds light in this context: "An issuer is not responsible for (1) the performance or nonperformance of the underlying contract, arrangement, or transaction, . . . (3) observance or knowledge of the usage of a particular trade." 810 ILCS 5/5-108(f). This concept is also incorporated into the Uniform Customs and Practices for Documentary Credits, the rules of custom and practice that apply both to commercial and standby letters of credit, and the International Standby Practices, rules of custom and practice that apply only to standby letters of credit. (DX 19)

89. In the June 2, 2005 letter, Mr. Gordon additionally advised Mr. Mantynband that "[u]nder the circumstances that we have been presented, it appears that the Bank would open itself up to unwarranted financial exposure if it were to later found to have wrongfully dishonored the Letter of Credit." (DX 19)

90. In the June 2, 2005 letter, Mr. Gordon further advised Mr. Mantynband for Allrite Sheetmetal to produce any additional information and an indemnification agreement by 4:00 p.m. on June 3, 2005 regarding its request that the draw request be dishonored. Allrite Sheetmetal was also invited to seek injunctive relief from the courts.

91. Neither Allrite Sheetmetal nor its counsel produced any additional information and/or an

indemnification agreement to the Bank by 4:00 p.m. on June 3, 2005.

92. The June 2, 2005 letter does not reference the absence of the original Irrevocable Letter of Credit being submitted with the draw request.

93. The June 2, 2005 Letter does not reference the absence of a copy of the default notice sent to Allrite Sheetmetal being submitted with the draw request.

94. On June 9, 2005, the Bank of Commerce, through its counsel, sent a letter to Carter's counsel regarding the May 17, 2005 and June 1, 2005 draw requests, which states:

> As we discussed this morning, we represent the Bank of Commerce in connection with the above-referenced Letter of Credit. The Bank has asked us to review the Letter of Credit in connection with a May 17, 2005 and a June 1, 2005 draw request asserted by Mary Louise Carter in her capacity as the putative executrix of the Beneficiary, Gordon Carter. We have been provided with a copy of both of your firm's letters, and ask for further documentation and/or legal authority confirming Ms. Carter's status as executrix of the estate. Please also provide us with any other support you have for the contention that she has succeeded to the rights of the Beneficiary by operation of law. We look forward to your reply. (DX 20)

95. The June 9, 2005 letter did not raise any of the claimed defects testified to by the Bank of Commerce's representatives, Frale and Connie Saiger (hereinafter "Saiger"), at trial, including that the original letter of credit and a copy of the default notice was supposed to be submitted with the draw request and that the draw request should have been for $150,000 and not $143,495.28.

96. The June 9, 2005 letter did not request that the original letter of credit or a copy of the default notice be submitted to the Bank of Commerce.

97. The June 9, 2005 letter was sent within seven business days of the June 1, 2005 letter from Mary Carter's counsel.

98. Other than the June 9, 2005 letter, neither the Bank of Commerce nor its counsel had any written or oral correspondence with Mary Carter or her counsel regarding the Letter of Credit.

99. In response to the June 9, 2005 letter from the Bank of Commerce's counsel, the necessary paperwork was submitted to the Circuit Court of the Nineteenth Judicial Circuit to have Mary Carter appointed executrix of her husband's estate even though the Will appointing her executrix was previously filed with the court in May of 2004.

100. On June 29, 2005, Mary Carter was officially appointed executrix of her husband's estate by the Circuit Court of the Nineteenth Judicial Circuit.

101. On June 7, 2005, Allrite Sheetmetal filed a lawsuit against Mary Carter and the Bank of Commerce seeking to enjoin the Bank of Commerce from honoring the draw request and to enjoin Mary Carter from making a draw request under the Irrevocable Letter of Credit.

102. At a status hearing on July 8, 2005, Mary Carter's counsel hand-delivered copies of the Letter of Office and other court papers regarding her appointment as executor to the Bank of Commerce's counsel, Allrite Sheetmetal's counsel and the Court.

103. Copies of these documents are contained in the Bank of Commerce's file pertaining the Irrevocable Letter of Credit.

104. In response to document requests issued by Allrite Sheetmetal, Mary Carter produced documents to Allrite Sheetmetal's counsel and to Bank of Commerce's counsel, including, but not limited to, the Will, the Amended Trust Agreement, the October 19, 2004 Default Notice with proof of service, and the filings regarding her appointment as executrix of Gordon Carter's Estate.

105. In October of 2006, Kwiat, the accountant for Grove Metal and the personal account for Mary Carter, issued a report stating it is his opinion that $232,716 was owed under the Consulting Agreement.

106. Kwiat's calculation of $232,716 is based upon his review of all 1,034 invoices of Allrite Sheetmetal from October 9, 2003 through June 9,

2004 to determine the average monthly sales for the seven months of payments and his calculation using the average monthly sales over the remaining 41 months under the Consulting Agreement.

107. On May 12, 2006, Mary Carter, through her counsel, served a letter with enclosures upon the Bank of Commerce's counsel in open court.

108. The May 12, 2006 letter enclosed copies of the filings pertaining to Mary Carter's appointment as executrix of Gordon Carter's Will, the original Irrevocable Letter of Credit, and a copy of the October 19, 2004 default notice with proof of service.

109. In open court and in a signed document, Bank of Commerce's counsel, David Gordon, acknowledged receipt of the original Irrevocable Letter of Credit.

110. A copy of the May 12, 2006 letter, including all enclosures and, specifically, the original letter of credit, is contained in the Bank of Commerce's file.

111. At the time of trial, the original letter of credit was in the Bank of Commerce's file.

The above findings of fact and the conclusions set forth below have been determined by the Court's review of the pleadings, the documents submitted into evidence as well as the Court's evaluation of the testimony of the witnesses. The Court has made certain assessments of the credibility of the witnesses based on their demeanor, whether their testimony was internally consistent and consistent with the

other witnesses' testimony, whether the witness was impeached and whether the testimony was reasonable considering all of the circumstances. The Court has also taken into consideration whether a witness is determined to be biased or has a motive to fabricate. In general, the Court finds the Defendant, Mary Carter, to be a credible witness. Her testimony was consistent and reasonable. It was also corroborated in all material respects by the testimony of Kwiat. Further, the Court finds Kwiat to be a credible witness. While Grove Metal was Kwiat's client, the Court finds him to be an unbiased professional accountant whose testimony was not materially impeached and was reasonable considering the circumstances.

On the other hand, the Court finds that Filosa was not a credible witness. Filosa's demeanor on the witness stand alternated between hostile and evasive. His testimony was impeached in several material respects. Significantly, Filosa was impeached regarding the nature of the two most important transactions, the purchase of Grove Metal's assets by Allrite Sheetmetal and the purchase of Allrite Sheetmetal's assets by Allrite Fabricating. The Court also finds Filosa's testimony concerning the terms of the agreement to buy Grove Metal's assets to be unreasonable. Filosa's admitted mistreatment of Kwiat when he went to inspect Allrite Sheetmetal's books and records, also detracts from his credibility. These matters are discussed in greater detail below. Additionally, the Court does not find the testimony of

Frale or Saiger to be of any value. This also will be discussed at length below.

CONCLUSIONS

The Sale of Grove Metal to Allrite Sheetmetal

The Asset Purchase Agreement and the Consulting Agreement

The parties' characterization of the nature and terms of this transaction are quite disparate. On the one hand, the Plaintiff contends that he bought this business for $325,000, a price which included the hard assets and the customer base or goodwill. On the other hand, the Defendant, Mary Carter and Kwiat both contend that the transaction was divided into two components for tax purposes. The $325,000 price found in the Asset Purchase Agreement represented the hard assets and the customer base or good will was represented by the amount due pursuant to the Consulting Agreement.

This is not a simple contract action, as the Court made clear throughout the trial. Therefore, the interpretation of the terms of the underlying contract is not the seminal issue in the case. The case law makes it very clear that payment on a letter of credit should not be made dependant on an analysis of the underlying obligation. However, as the Plaintiff has claimed that the draw request was a fraudulent act, the state of mind of Mary Carter in making the request becomes relevant.

The Court finds that the testimony of Mary Carter and of Kwiat as to their understanding of the nature and terms of this transaction is reasonable. On the other hand, Filosas's testimony in this regard is not reasonable and is rejected.

It is a common occurrence that the sale of a business is accomplished by a contract for sale at a price for less than the value of the business accompanied by an employment contract for the seller. This is to minimize the taxable effects of the transaction. Kwiat testified that this was a mutually tax beneficial sale, beneficial to both Allrite Sheetmetal and Grove Metal. As a result of this structure, Allrite Sheetmetal was able to deduct the payments made under the Consulting Agreement and Gordon Cater [sic] would be able to spread the income out over 48 months. (Kwiat p. 119). Filosa's testimony that the structure of the sale was not beneficial to him or Allrite Sheetmetal from a tax perspective is rejected (Filosa, pp. 65-66).

Furthermore, Filosa's central contention that the Asset Purchase Agreement's price of $325,000 represented the entire value of Grove Metal is not reasonable and is also rejected. Kwait testified that in 2002, Grove Metal's sales were $2.1 million and in 2001 the sales were $2 million (Kwiat p. 115). He further testified that from a conservative stand point, the purchase of Grove Metal's customer base added one million dollars to Allrite Sheetmetal. That did not include the hard assets or equipment that Filosa was later able to sell at auction. (Kwiat p. 112). It is not

reasonable to conclude that the Carters were willing to sell Grove Metal for $325,000 including the machinery when it was bringing in millions of dollars per year in revenue.

The terms of the Consulting Agreement alone lead to the same conclusion. Payment under the terms of this agreement was specifically not dependent on any work done and the agreement provided for payments after Gordon Carter's death to a beneficiary.

The Court thus finds that the only reasonable interpretation of the nature of the transaction was that the combination of the sale price found in the Asset Purchase Agreement and the payments due under the Consulting Agreement represent the full sales price for the transaction. These payments were to continue through November 2007 and these payments were guaranteed by the Letter of Credit.

The Sale of Allrite Sheetmetal to Allrite Fabricating

The Court finds that the legal characterization of the sale of Allrite Sheetmetal's assets to Allrite Fabricating is not be [sic] the determinative factor in this matter. Further, the Court finds the crucial issue to be the Plaintiff's allegation of fraud. This will be discussed at length below. However, the Court finds it necessary to discuss its conclusions as to the nature of this transaction. At a minimum, the nature of this transaction and what became known to Mary Carter

bears on her state of mind at the time of her draw request.

The Consulting Agreement provided in "Paragraph 10 Miscellaneous" that the "agreement is binding on and inures to the benefit of each of the parties and their respective successors and assigns." The agreement was to run through November of 2007. However, just one year after execution of this agreement, Filosa sold the assets of Allrite Sheetmetal to Allrite Fabricating.

On direct examination, the transaction in September 2004 was portrayed by Filosa as a liquidation. The Court finds that the portrayal of this transaction as a liquidation was an attempt to mislead the Court. Liquidation is relevantly defined in *Black's Law Dictionary* as "the act or process of converting assets into cash, especially to settle debts." 942 (7th ed. 1999). The term connotes the end of a business accompanied by a sell-off of all hard assets in an arms-length transaction to pay off debts. Skillful cross examination, however, revealed that this was hardly the case here. The assets of this business were simply transferred to Nick Marchese, the son of Filosa's business partner, Joe Marchese. Presumably another debt was incurred to pay off Allrite Sheetmetal's debt, (although this was not developed in the evidence) and Allrite Fabricating began to service Allrite Sheetmetal's customers. Filosa's business partner then began working at Allrite Fabricating. Allrite Fabricating was created solely for the purpose

of taking over Allrite Sheetmetal. This was hardly an arms-length transaction.

Kwiat's dogged investigation, which was hampered by both Filosa and Joe Marchese, gave Mary Carter the knowledge that Joe Marchese was still running this business and that Allrite Fabricating was still servicing Grove Metal's customers. Grove Metal's customers were even buying sheetmetal from Allrite Fabricating under the same SKU number used by Allrite Sheetmetal. A crucial sequence of the cross examination occurred when Filosa steadfastly denied that he sold Allrite Sheetmetal's assets to Allrite Fabricating. He was thoroughly impeached on this point by his deposition testimony in which he admitted selling Allrite Sheetmetal's assets to Allrite Fabricating one year after the execution of the Consulting Agreement. (Filosa p. 50, 53.)

Lastly, it was a startling admission by Filosa when he admitted that Allrite Fabricating continued to collect Allrite Sheetmetal's receivables after this sale. Filosa contended that these revenues were used by Allrite Fabricating to pay Allrite Sheetmetal's payables. No portion of these revenues were paid over to Filosa or to Mary Carter. This confirms that Allrite Fabricating is simply a continuation of Allrite Sheetmetal rather than a sale of assets after a liquidation. The Court finds that any receivables collected by Allrite Fabricating from Grove Metal's original customers are is subject to the 4% payment to Mary Carter required by the Consulting Agreement. This alone would justify Mary Carter's draw request.

This Court finds that the transfer of Allrite Sheetmetal's assets to Allrite Fabrication [sic] was, while it may have also served other purposes, an attempt
to avoid its responsibilities under the Consulting Agreement.

The Draw Request

In his letter of June 2, 2005, counsel for the Bank of Commerce dismissed Allrite Sheetmetal's objections to the draw request. The letter also indicated that absent new information the draw request would be honored unless Allrite Sheetmetal received injunctive relief from the Court. No such information was sent to the Bank.

The Court agrees with the Bank of Commerce's evaluation as set forth in the June 2, 2005 letter. Most importantly, Mr. Gordon correctly stated that is [sic] was inappropriate to deny the draw request simply because Allrite Sheetmetal disputed that money was owed pursuant to the underlying Consulting Agreement. Allrite Sheetmetal's position "ignored the principles of autonomy that gives the letter of credit its unique guarantee as a swift, certain, flexible, and an economically efficient payment mechanism."

The Court finds it appropriate to comment at this time on the testimony of Frale. First of all, Frale was significantly impeached when he steadfastly denied that he told Filosa in a telephone conversation that the draw request would have to be paid. Filosa

specifically testified that Frale told him exactly that during their conversation in May of 2005.[1]

Frale's testimony concerning the June 2, 2005 letter, written by his own counsel, was nothing less than exasperating. First, it was clear to the Court that he was unfamiliar with its contents, as he was with regard to most of the facts of this case. Frale took the position that the draw request was insufficient as the original letter of credit and the default notice was not included. When confronted with the June 2, 2005 letter, he initially contended that it was not inconsistent with his position. He cited the phrase "additional facts" purportedly from the letter, and indicated that the lack of an original letter of credit and default notice were additional facts that would warrant dishonor of the draw. Under questioning from the Court, it was pointed out to Frale that the correct phrase from the letter was "in the absence of other facts and circumstances currently unknown to the Bank." Frale's response was, "Oh, that's . . . I'm sorry. I misinterpreted it." (Frale p. 68.)

Frale's lack of knowledge as to this crucial letter's contents caused the Court to call a recess and to direct Frale to re-read the exhibit during that time. When Court was reconvened, on cross-examination, Frale ultimately had to admit that the absence of the

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[1] The Court has already found Filosa's testimony to be less than credible. However, his position here at least comports with the Bank's position as stated in its June 2, 2005 letter.

original letter of credit and the default notice were matters that were known to the Bank at the time of the June 2, 2005 letter.

Frale's lack of knowledge as to the contents of this document, as well as to the contents of the Bank's file was startling. He even misinterpreted the terms of the letter of credit, steadfastly contending that it was linked to a single draw, ignoring the word "aggregate." Counsel for the Plaintiff, who called this witness to the stand, hotly contested Frale's interpretation of the letter of credit on this point.[2] Frale initially denied that Mary Carter's letters of office and the original letter of credit were in the Bank's files at the time of trial. Later in the cross-examination, he had to ultimately admit that those documents were in the file after Defendant's counsel was able to peruse the file and show him the documents.

Frale's testimony was unreasonable and contradictory in many respects. It was impeached by Filosa's testimony and also showed a lack of knowledge as to crucial facts. On the whole, the Court finds Frale's testimony to be very troubling. His testimony is completely disregarded.

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[2] In that regard, Allrite Sheetmetal later felt it necessary to present the testimony of Saiger to correct that testimony, however, Saiger ultimately declined to take a position on that issue indicating she would need advice from others. The Court notes that the Consulting Agreement clearly provides for multiple draws upon the letter of credit.

Pursuant to the Bank's request, Mary Carter procured letters of office regarding her husband's estate and presented those to the Bank. The original letter of credit and the default notices have also been tendered. The Court finds that the draw request made by Mary Carter has been sufficiently perfected.

Material Fraud

Plaintiff claims that even if the technical requirements of a draw request have been met, the Court should enjoin payment as the request was an attempt to perpetuate a material fraud. On the other hand, Mary Carter claims that the Plaintiff has failed to prove material fraud and that this claim is merely an attempt to force the Court to perform a prohibited analysis, a review of the parties' obligations pursuant to the underlying transaction. This is an attempt, claims Mary Carter, to "stretch" a contract dispute into a claim of fraud.

As noted above, 810 ILCS 5/5-103(d) sets forth the "independence principle," making a determination of the parties' rights and obligations pursuant to the underlying contract wholly improper.

Section 5-109(b) provides however, that if an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a Court may enjoin the issuer from honoring the presentation only if the Court finds that:

a. the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

b. a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

c. all of the conditions to entitle a person to the relief under the law of this State have been met; and

d. on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1). 810 ILCS 5/5-109(b).

The Uniform Commercial Code Comment on the above section provides:

> Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in *Intraworld Indus. v. Girard Trust Bank,* 336 A.2d 316 (Pa. 1975), *Roman Ceramics Corp. v. People's Nat. Bank* 714 Fed.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in *Ground Air Transfer, Inc. v.*

Weslate'sAirlines, Inc., 899 F.2d 1269, 1272-73 (1st Cir. 1990):

> We have said it throughout that courts may not "*normally*" issue an injunction because of an important exception to the general "no injunction" rule. The exception as we also explained in Itek, 730 F.2d at 24-25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "*plainly*" show that the underlying contract forbids the beneficiary to call a letter of credit, Itek, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "*colorable*" right to do so, id., at 25, where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see Dynamics Corp of America 356 F.Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," Itek, 730 F.2d at 25 (quoting *Roman Ceramics Corp v. Peoples National Bank*, 714 F.2d 1207, 1212 n.12, 1215 (3d Cir. 1983) (quoting Intraworld Indus., 336 A.2d at 324-25)); *then* a court may enjoin payment.

810 ILCS 5/5-109 cmt.(2004) (Letters of Credit).

In *Prairie State Bank v. Universal Bonding Ins. Co.*, 953 P.2d 1047 (1998), cited by the Plaintiff, the Court of Appeals of Kansas summarized the independence principle and its fraud exception as follows:

> As a general rule, in commercial transactions, whether dishonor of a letter of credit by an issuing bank or an injunction barring the issuing bank from honoring the letter of credit will be justified depends on whether the fraud is of such a serious nature as to outweigh the public policy considerations in making an issuing bank's obligation to pay upon demand under the letter of credit independent of the underlying transaction between the customer who has obtained the letter of credit and the beneficiary. Some of the courts which have considered the issue have described the type of fraud which will justify dishonor of a letter of credit . . . as fraud so egregious as to vitiate the entire transaction. *Prairie State Bank*, 953 P.2d at 1052.

Most courts agree that to sustain a claim of fraud it must be shown *inter alia*, that a party making a materially false statement knew the statement was false or believed it to be untrue and that the statement was made for the purpose of inducing another party to act. *Farm Credit Bank v. Isringhausen*, 210 Ill. App. 3d 724 (1991). In other words, the statement

complained of must be made with fraudulent intent, or with the intent to deceive. *See United States v. Swearingen,* 858 F.2d 1555 (1988), cited by the Plaintiff, wherein the Court of Appeals for the 11th Circuit stated, "What is important is the intent of the person making the statement that it be in furtherance of some fraudulent purpose." (Finding therein that the defendant made a misrepresentation knowingly with intent to deceive the bank in question.) *United States v. Swearingen,* 858 F.2d at 1558.

Here the Court finds that the Plaintiff has failed to show pursuant to Section 5-109(b) that honoring the draw request would perpetuate a material fraud as defined above. Specifically, the Court has found that Mary Carter in good faith believed that the amount due under the Consulting Agreement represented a portion of the purchase price of Grove Metal. Mary Carter also in good faith believed at the time of her draw request, based on the facts known to her and on the advice of her counsel, that Allrite Sheetmetal had wrongfully attempted to avoid its obligations under that agreement by a less than arms-length transfer of Allrite Sheetmetal's assets to Allrite Fabricating. She also knew at the time of her draw request that Allrite Sheetmetal, Filosa, and Joe Marchese had actively frustrated Kwiat's attempt to quantify the exact amount of revenue being generated by former Grove Metal customers. The amount demanded by the draw request was therefore, by necessity, based on a calculation provided to her by her attorneys, made on a per diem basis over the

term of the contract which was significantly less than the figure ultimately provided by her accountant. The Court here further finds that nothing in the nature of a letter of credit precludes a draw request being based on such a calculation, especially under these circumstances, as issuers and the Courts are not to be drawn into disputes over the exact amount due pursuant to the underlying transaction.

The Court therefore finds that Mary Carter acted in good faith when she made her draw request and that fraudulent intent or the intent to deceive has not been shown. The Plaintiff has not shown fraud at all, let alone fraud of such a serious nature as to outweigh the public policy considerations underlying the independence principle. Her conduct was clearly not so egregious as to vitiate the entire transaction, especially as it was in response to the Plaintiff's wrongful attempt to avoid its obligations.

Equity

In addition to all of this above, the Court finds that the Plaintiff has failed to make all of the required showings for the issuance of injunctive relief. Specifically, the Plaintiff has failed to show that it faces irreparable injury and that it lacks an adequate remedy at law. This case is about money, and money only. As explained above, it is inappropriate in this matter to examine the underlying transaction, the obligations under the Consulting Agreement. Upon honor and payment of the draw

request, should the Plaintiff wish to contest the amount owed under the Consulting Agreement, the Plaintiff is free to bring that matter to the courts in a separate lawsuit. No evidence has been brought forth to show that an enforceable remedy is not available to the Plaintiff through the courts.

The Court is also required to examine the balance of the equities. Mary Carter has in good faith attempted to secure payment of a debt owed to her deceased husband. On the other hand, the Plaintiff's misdeeds with regard to this matter can be delineated as follows:

a. The Court has found that the transfer of Allrite Sheetmetal's assets to Allrite Fabrication was an attempt to avoid its obligations under the Consulting Agreement.

b. The Plaintiff's agents, Filosa and Joe Marchese intentionally frustrated Kwiat's attempts to investigate the matter.

c. Filosa attempted to mislead the Court by describing the sale to Allrite Fabricating as a liquidation.

The Plaintiff has accused Mary Carter of coming to this Court with unclean hands. However, the Court finds just the opposite, the Plaintiff and its President, Filosa, have come to the Court with unclean hands while requesting injunctive relief. They have done everything they can do to avoid the payment of a legitimate debt to the estate of Gordon Carter. Equity should not aid the Plaintiff.

The Court further finds that its findings and conclusions herein make the interpleader action brought to the Court by the Bank of Commerce moot and no further litigation is justified as a result. This, of course, does not include the Bank's request for fees and expenses which will be the subject of separate hearings.

WHEREFORE the Court orders as follows:

1. The Plaintiff's demand to enjoin payment resulting from Mary Carter's draw request on the letter of credit is denied and judgment is entered in favor of Mary Carter on the count seeking an injunction.

2. Bank of Commerce is ordered to honor Mary Carter's draw request and to immediately pay her the amount of $143,495.28.

3. The Bank of Commerce claims are dismissed as moot.

4. In the event of an appeal or other stay issued with regard to the payment ordered in Paragraph 2 above, the Bank of Commerce is hereby enjoined from releasing the funds held in escrow to guarantee the payment of this letter of credit, previously listed as Certificate of Deposit #32239, until further order of the Court.

5. After payment as described in Paragraph 2 above, the remaining balance of the Certificate of Deposit described above in Paragraph 4 shall be held by the Bank until disposition of its request for reimbursement

of fees and costs. The Bank is hereby granted leave to file its Petition for Fees and Costs in that regard within 21 days of this Order. A status hearing is set with regard to that matter on September 13, 2007 at 10:30 a.m.

6. The Court further finds pursuant to S. Ct. Rule 304(a) there is no just reason to delay enforcement or appeal of this Order.

Enter:

_____

Judge Stuart E. Palmer

IN THE CIRCUIT COURT OF COOK COUNTY COUNTY DEPARTMENT, CHANCERY DIVISION

ALLRITE SHEETMETAL, INC., an Illinois corporation,

Plaintiff

v.

BANK OF COMMERCE, an Illinois state bank, and MARY LOU CARTER a/k/a MARY LOUISE CARTER,

Defendants.

No. 05 CH 09623

Honorable Stuart Palmer
Room 2305

ORDER

This matter coming to be heard for status and on Plaintiff's motion for leave to file Plaintiff's response instanter this court being fully advised:

IT IS HEREBY ORDERED:

1. Plaintiff's motion for leave to file its response instanter is granted;

2. Defendant Carter's motion to strike exhibit A of Plaintiff's reply is support of post-trial motion is granted. Exhibit A is hereby stricken.

3. Plaintiff's post-trial motion after judgment pursuant to 5/2-1203 filed on 8-20-07 is hereby denied.

4. Plaintiff's oral motion for stay of enforcement of this order 8/15/07 judgment is hereby denied.

5. The court retains jurisdiction over Carter's motion for award of fees and expenses under 810 ILCS 5/5-111.

Kimberly A. Cloud
Atty: for Defendant Carter
330 N. abash Ave, 22nd Fl.
Chicago, Illinois 60611
Telephone (312) 846-7000

ENTER:

/s/ Judge Stuart Palmer
Oct 19, 2007

/s/ _____
JUDGE

IN THE CIRCUIT COURT OF COOK COUNTY COUNTY DEPARTMENT, CHANCERY DIVISION

ALLRITE SHEETMETAL, INC., an Illinois corporation,

Plaintiff

v.

BANK OF COMMERCE, an Illinois state bank, and MARY LOU CARTER a/k/a MARY LOUISE CARTER,

Defendants.

No. 05 CH 09623

Honorable Stuart Palmer
Room 2305

ORDER

This cause came on to be heard, the Court being advised that the Plaintiff, Allrite Sheetmetal, Inc. has filed a petition under Chapter 7 of the Unites States Bankruptcy Court. The Court acknowledges that there has been displayed to it the Notice of the Clerk of the Unites [sic] States Bankruptcy Court for the Northern District of Illinois with regard to the Chapter 7 bankruptcy case, 06-06073 Allrite Sheet Metal, Inc., meeting of creditors and deadlines. The Court has taken judicial note of said filing.

The Court being advised that the claims asserted herein by Allrite are claims by Allrite and not claims against Allrite as the Chapter 7 Debtor.

The Court having considered the Motion of the Plaintiff for the entry of an order directing the appearance for their discovery depositions of Messrs.

Kennedy Richman, Alexander Marks and Frederic Mendelsohn, and for the records deposition of the law firm of Burke, Warren, Mackey and Serritella, and having considered the countermotion to quash subpoenas made by the Defendant Carter. The Court having had the benefit of the arguments of counsel and being fully advised in the premises,

IT IS ORDERED:

The motion of the plaintiff is denied. Messrs Richman, Marks and Mendelsohn are barred from testifying or giving any evidence in this cause. The referenced subpoenas are quashed. Cause continued to June 26, 2006 at 10:00 a.m. All other pending matters are continued to June 26, 2006.

Carter shall seek relief from the Bankruptcy Court to lift any stay that might prohibit this action from proceeding.

Entered June 12, 2009

ENTER: APP 000035

/s/ _____
JUDGE

108643

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 30, 2009

Mr. Ralph A. Mantynband
Shefsky & Froelich LTD
111 E. Wacker Dr.
Suite 2800
Chicago, IL 60601

No. 108643 – Allrite Sheetmetal, Inc., etc., petitioner, v. Bank of Commerce, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 4, 2009.

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT,
CHANCERY DIVISION**

ALLRITE SHEETMETAL, INC., an Illinois corporation,

Plaintiff

v.

BANK OF COMMERCE, an Illinois state bank, and MARY LOU CARTER a/k/a MARY LOUISE CARTER,

Defendants.

No. 05 CH 09623

Honorable
Stuart Palmer
Room 2305

POST TRIAL MOTION AFTER JUDGMENT PURSUANT TO 5/2-1203 OF THE ILLINOIS CODE OF CIVIL PROCEDURE

NOW COMES THE PLAINTIFF, ALLRITE SHEETMETAL, INC. and moves this Honorable Court for a rehearing, a retrial, a new trial and a modification of the Judgment heretofore entered on August 15, 2007 and to vacate that Judgment and for other relief.

Movant states:

1. The Judgment is contrary to the law.

2. This Court erred in determining that it had jurisdiction over unstated claims for relief by Carter or by the Bank. This matter proceeded before the Court by reason of an Order of the Bankruptcy Court

abandoning to Filosa the right to proceed to enjoin the Bank from paying for the account of Allrite on the Letter of Credit because of the deficiencies in the draft presented for payment.

3. The Judgment is contrary to the evidence.

4. The Judgment is contrary to the manifest weight of the evidence.

5. The Court has received official notice that Allrite was the subject of a pending bankruptcy and of the automatic stay provisions of Section 362 of the Bankruptcy Code (11 USC 362).

The Court, in the subject Order, exercised jurisdiction and made factual findings and legal conclusions inimical to the bankruptcy proceeding and the automatic stay imposed by Section 362.

This Court was required to examine its own jurisdiction *sua sponte, see Ferguson v. Riverside Medical Center*, 111 Ill.2d 436, 440, 490 N.E.2d 1252 (1985). This obligation exists for the trial court, and existed even if neither party has raised the issue. *Archer Daniels Midland Co. v. Barth*, 103 Ill.2d 536, 539, 470 N.E.2d 290 (1984).

The Court, in entering the Judgment of August 15, 2007, as far as affirmative relief to Carter or to the Bank, lacked subject matter jurisdiction, *i.e.* the power of the Court to hear and determine the general question presented to it and to grant the particular relief granted, was lacking.

The supremacy clause in Article VI of the United States Constitution provides that the laws of the United States:

> shall be the supreme law of the land * * * anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2.

Consequently, even a court of general jurisdiction lacks subject matter jurisdiction when its powers to act in a particular manner has been divested by a Federal Statute.

6. On June 12, 2006, this Court entered an Order directing Carter to seek relief from the Bankruptcy Court to lift any stay that might prohibit this action from proceeding. Carter neither applied to nor received any relief from the automatic stay, which remained in full force and effect. Carter, although ordered to do so, made no such claim in the Bankruptcy Court, where it had the opportunity to assert such a claim against Allrite Sheetmetal, or to secure relief from the stay to present the matter to this Court. This Court's Order of June 12, 2006, mandated:

> 5. Carter shall seek relief from the Bankruptcy Court to lift any stay that might prohibit this action from proceeding.

This Court was without jurisdiction to enter an order adverse to Allrite, which was entered in conflict with the automatic stay. *See Cohen v. Silata*, 303 Ill.App.3d 1060, 709 N.E.2d 668 (1st Dist 1999) for an

authoritative opinion noting that any complaint for relief accepted by this Court was void *ab initio*.

The Judgment of August 15, 2007, was adverse to Allrite. The Court was without jurisdiction to do so. The case was tried on the application of Allrite to enjoin the Bank from honoring a draft presented to the Bank of Commerce. Carter has filed no claim against Allrite or the Bank which was before the Court. The Court was without jurisdiction to order the Carter draft to be paid.

7. The Court erred in not applying the requirement of strict compliance.

The Court's attention is directed to *Mount Prospect State Bank v. Marine Midland Bank*, 121 Ill.App.3d 295, 459 N.E.2d 979 (Ill. App. 1 Dist., 1983). There the court pointed out:

> Thus, a letter of credit is an undertaking independent of any underlying contract, unless the letter of credit provides to the contrary.

This would include the Court's references to the Asset Purchase Agreement and the Consulting Agreement, upon which documents the Court based its ruling.

In *Mt. Prospect, supra*, the Appellate Court held:

> The majority rule in the United States appears to hold the beneficiary of a letter of credit to a standard of strict compliance when it is seeking to hold the issuer accountable

> for failing to honor a draft. [*Citing authority*.] '[T]he beneficiary must meet the terms of the credit – and precisely – if it is to exact performance of the issuer. Failing such compliance there can be no recovery from the drawee.' [*Citing authority*.]

The Court continued:

> . . . we are of the opinion that the variance here between the terms of the letter of credit and the documents submitted is not insignificant. Accordingly, regardless of whether the standard of compliance in Illinois is strict compliance or reasonable compliance, we hold that Mount Prospect was not required to honor the drafts presented by Marine Midland.

Within that same standard as announced by the Appellate Court, an estimate of the sum due could never constitute a representation upon which the issuing Bank could rely that this was the sum due, and not an estimate of the sum due, as the Letter of Credit required.

The cases are legion where the use of an estimate would not comport with the standard of strict compliance. *See*, for example, *Bisker v. Nationsbank NA*, 686 A.2d 561, (DC 1966), which held that under the standard of strict compliance for determining a bank's duty to honor a letter of credit, the tendering of a photocopy of a promissory note with the beneficiary's demand for payment, the beneficiary did not

strictly comply with the letter of credit and therefore the draft was properly rejected.

In fact, the Courts frequently refer to that oft-cited maxim from the House of Lords that in letter of credit transactions:

> [T]here is no room for documents which are almost the same or which will do just as well.

Equitable Trust Company of New York v. Dawson Partners, Ltd., 27 Lloyd's Law List Rep. 49, 52 (H.L. 1927).

There is no doctrine of "substantial compliance" under the UCC or the law of letters of credit. In fact, the 2005 draw was calculated on 4% commission to be earned, if at all, in at least 3 years in the future – not 2005.

8. The Court, in its Opinion, held that the claim by Carter was based upon the acts and business of an unrelated party, i.e. Agivil, Inc. Agivil is not a party to the instant action.

There is not one scintilla of documentary evidence or direct testimony which shows that a single identified Allrite customer had work performed after the company went out of business and filed its petition in bankruptcy.

There is no evidence that would incorporate Agivil's activities as being the responsibility of the bankrupt Allrite Sheetmetal, Inc.

It was the Plaintiff's position that the representation that $143,495.28 was actually due from Allrite Sheetmetal was not true.

That representation gave Carter no basis for making a draw upon the Letter of Credit. As a matter of law, it would have been a fraud in the transaction, which would justify enjoining the payment of the draft when the representation is based upon an estimate and not upon a fact.

The strict compliance standard is not inconsequential. The Court of Appeals, in *Beyene v. Irving Trust*, 762 F.2d 4 (2nd Cir 1985), affirmed the enjoinder of a draft on a letter of credit where the name "Sofan" was misspelled as "Soran," holding that that was a material discrepancy. The Judge of the Second Circuit emphasized, in affirming the decision of the trial court:

> In order to protect the issuing or confirming bank, this absolute duty does not arise unless the terms of the letter have been complied with strictly. Literal compliance is generally 'essential so as not to impose an obligation upon the bank that it did not undertake and so as not to jeopardize the bank's right to indemnity from its customer.' [*Citing authority*.]

In the case here, the reliance upon the estimate of the sum due created an analogous situation where there was no literal compliance with the representation of the sum due.

9. The award by the Court is excessive as a matter of fact. The only factually supported amount as being due was $8,525.

10. The award by the Court is excessive as a matter of law. Carter failed to be in strict compliance with the documentary requirements

11. The Court erred in admitting improper evidence offered by the Defendant Carter set forth therein including the testimony of the accountant Larry Kwiat.

The Court in its Order determined that it relied upon the testimony of Kwiat, whose sworn testimony at the trial regarding material matters was entirely opposite and diametrically opposed to his sworn testimony in the pre-trial discovery deposition. That discovery deposition has been filed with the Report of Proceedings as a refused exhibit of the Court.

Carter and Grove's accountant, Larry Kwiat at his deposition testified that he first gave a report of an accounting to Fred Mendelsohn on October 21, 2005, some five months after Mendelsohn wrote his demand letter. Kwiat testified:

Q Did you prepare a report for anyone in regards to your anticipated testimony?

A Did I prepare a report?

Q Yes, sir.

A Yes, I did.

Q And to whom did you give that report?

A Fred Mendelsohn.

Q How long ago did you give it to him?

A Friday.

Q Friday of this last week?

A Yes.

Q Which would be, what, the 21st or 22nd of October of 2005, something like that?

A Okay.

Page 25, line 14 through pg. 25, line 3

Q Did you give him a figure as to the sum then due from Allrite to Gordon Carter?

A No, I did not.

Page 49, lines 1-3

* * *

THE WITNESS: I prepared that in October.

BY MR. MANTYNBAND:

Q And this was the first one you ever prepared?

A Yes, sir.

Q You never prepared one that said there was $143,495, did you?

A No, I did not.

Q To your knowledge did anyone else ever prepare a report like that?

A I believe the attorneys for Mary Carter did, yes.

Q And did you ever furnish them with the underlying information?

A I furnished Fred Mendelsohn with the seven checks of 39,000 received.

Q And that's it?

A Yes.

Q Nothing else?

A No.

Q You never furnished him with a calculation of the sums then due?

A Prior to Exhibit A, no.

Q That's Exhibit 1.

A Exhibit 1.

Page 56, line 23 through page 57, line 24

Q Did you do the financial workup of the transaction for Grove?

A No, I did not.

Q Who did?

A I believe Mr. Richmond.

Q The lawyers did that?

A Yes.

Page 43, line 3 through 9

12. The Court erred in admitting illegal and improper exhibits into evidence over the objection of the Plaintiff.

13. The Court erroneously and improperly restricted the cross-examination of the witnesses Frale, Saiger and Carter.

14. In Finding 22, the Court did not limit itself to the terms of the Letter of Credit but journeyed outside the terms of Letter of Credit into the definition of gross receipts paid to the "corporation" [which refers to Allrite Sheetmetal, Inc. a bankrupt and not to any other corporation].

15. The Court erred as a matter of law in its Finding No. 32 where it found that there was a specific oral agreement at the closing of the Asset Purchase Agreement that would vary the terms as to the responsibility of the parties under the Consulting Agreement.

There being no ambiguity claimed in the Consulting Agreement, there was no basis for the Court to accept parol evidence.

There is no claim, nor was any evidence received by the Court, that the terms of the Consulting Agreement were ambiguous or not complete and clear.

No legal evidence with regard to the Finding exists which would constitute a prior or contemporaneous agreement or understanding.

If there were any such evidence, it should not have been received into evidence as a matter of law. *See Western Illinois Oil Co. v. Thompson*, 26 Ill.2d 287, 186 N.E. 2d 285 (Ill. 1962).

The Finding made by the Court as a matter of law does not show a subsequent oral agreement which modified the terms of the written contract or show that a provision of the written contract has been waived. The Finding shows no waiver or modification of the written contract, the Consulting Agreement having been reduced to writing, it is presumed to speak the intention of the parties who signed it.

It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence. *Western Illinois Oil Co. v. Thompson*, 26 Ill.2d 287, 186 N.E. 2d 285 (Ill. 1962), *Emerich Co. v. Siegel, Cooper & Co.*, 237 Ill. 610, 86 N.E. 1104 (1908).

16. The Court, in Findings 33 through 38, violated the parol evidence rule by permitting and making its Findings based upon oral conversations as the negotiations which merged into a written contract.

17. In Findings 56 *et seq.* the Court refers to "Allrite Fabricating." The evidence has established there is no such entity. There was a corporation called Agivil, an Illinois corporation, established by the evidence.

18. In its Findings Number 60 and 61, the Court accepted as the basis of those findings the

hearsay testimony of Mary Carter over the objections of the Plaintiff.

The Plaintiff was prejudiced by Findings Nos. 60, 61 and 62, where the Court determined that Carter "learned from her two sons, who still have contact with prior customers of Grove Metal, that Allrite Fabricating was servicing some of Grove Metal's customers" but failed to call either of her sons as a witness. In the circumstances and testimony here, where Carter had no direct evidence, nor did the witness Kwiat have any direct evidence as to whether or not Agivil Corporation was servicing some of Grove Metal's customers and as to the identity of those customers and whether or not they were prior customers of Grove Metal's prior to the original sale. The law is, and the Court erred by not following same, that when the two sons who, according to the testimony of Carter

> [h]ad knowledge of the facts and were [accessible to a party] is not called by that party, a presumption arises that his testimony would be adverse to that party . . .

Bassi v. Morgan, 6 Ill.App.2d 1, 208 N.E. 341 (1965).

19. In the Findings the Court makes reference to Mr. Joe Marchese, apparently on hearsay testimony of Kwiat, determined that he was working at Agivil, Inc.

However there was no evidence that Joe Marchese was working at Agivil, Inc. or even present in

the United States at the times referred to in the Court's Findings.

The Court's factual Findings as to Finding 67, 69 and 70 rely upon hearsay conversations with Joe Marchese, a former shareholder of Allrite Sheetmetal. However, Joe Marchese neither worked at Agivil, nor was there any evidence that he had any conversations with Kwiat on any subject matter. There [sic] conversations were received over Plaintiff's objections. The Finding by the Court is not supported by the evidence, nor does it overcome the presumption of the anticipated unfavorable testimony of the Carter sons, who were not called as witnesses.

20. The Court based Findings 72, 73 and 74 upon the alleged activities of Kenneth Richman, a witness whose discovery deposition was prevented by an Order of this Court quashing the subpoena served upon him and striking the Notice of Deposition for his testimony. Movant was deprived of the ability to prepare for the examination of Mr. Richman, whose deposition testimony was barred by the Court Order of June 12, 2006 (copy attached). The Movant was prejudiced in the presentation of its evidence.

Finding No. 76, with regard to a conversation between Kwiat and Frederic Mendelsohn, another lawyer for Carter, which was a hearsay received over objection. Mendelsohn was another potential witness whose discovery deposition was denied pursuant to an Order of the Trial Court.

The references to Alexander Marks set forth in Finding No. 86, are subject to the same objection of prejudice to the Plaintiff by the Court in denying the Plaintiff its right and ability to take the noticed and subpoenaed deposition of Alexander Marks for discovery in this case pursuant to the Order of this Court, *supra*, dated June 12, 2006.

21. There was no specific evidence received by the Court that determined the amount or sum due as described in the Letter of Credit was $143,495.28. The law governing letters of credit does not authorize a deviation from its terms but requires strict compliance and a definitive statement as to the precise sum due. The Court had no legal authority to vary the terms of the Letter of Credit and permit the draw to be based upon an estimate rather than the actual sum due under the Letter of Credit.

The evidence established that the sum was calculated as to future anticipated sale for at least two years in the future and not the sums presently due.

22. The evidence set forth in Findings 105 and 106, concerning the October 2006 calculation by Kwiat, did not form any basis for the earlier, May 2006 demands and were contradicted by his deposition testimony as set forth above.

23. The principal manager of Agivil was Nicholas Marchese. The representative of Agivil was included in the Carter list of witnesses in the Disclosures dated October 17, 2005, and June 30, 2006, under Rule 213, but never called to testify by Carter.

24. The Conclusion of Law stated at page 18 and 19 with regard to the tax benefits of a consulting and non-compete agreement is belied by the record. The Court accepted Kwiat's testimony that there was a tax advantage to Allrite by entering into a consulting and non-compete agreement with Gordon Carter. On the other hand, the Court accepted into the record the orders of the Bankruptcy Court under Chapter 7 of the Bankruptcy Court, showing that Allrite Sheetmetal was bankrupt and unable to pay its creditors. This corroborates the testimony of Filosa that he had a net operating loss carry forward and there was no income to shelter under the Consulting and Non-Compete Agreement, and the fact was there was no tax benefit to Allrite Sheetmetal under the Consulting Agreement.

25. The Court's Conclusion as to the value of Grove Metal has no basis in any evidence. There was no expert testimony appraisal or the like.

Kwiat was never qualified as an expert appraiser or had any other basis for estimating the value of Allrite's purchase in any respect. There was no evidentiary foundation for the determination by the Court as to what value, if any, was or was not purchased by Allrite. The evidence established that it was an arm's length transaction, ironically, where Carter was represented by counsel and Allrite was not.

The Conclusion that the Consulting Agreement between an independent contractor and Allrite was part of the consideration of the Asset Purchase

Agreement contradicts the Asset Purchase Agreement and the Bill of Sale thereunder, which shows it was a finite sale of the assets and not of the going concern.

26. The Court erred in its Conclusion of Law at page 20 at which the Court made an interpretation of the Consulting Agreement, which was not an issue before the Court. The issue before the Court was an application for an injunction to restrain the Bank from paying against a draft made upon the Bank that was not strictly in compliance with the terms of the Letter of Credit. The Court, in its Conclusions at page 20, recognized that there was no evidence underlying its Conclusion in interpreting the contract. The interpretation of the contract was not before the Court. The issue was the compliance with the requirements of presenting a draft on a financial institution for a letter of credit.

The only parties to the contractual relationship with regard to the Consulting Agreement and Non-Compete Agreement was Allrite, an Illinois corporation, and Gordon Carter. Filosa, in his individual capacity, was not a party to any of those agreements.

27. The Court made a Conclusion at page 27, wherein it stated:

> Specifically, the Court has found that Mary Carter in good faith believed that the amount due under the Consulting Agreement represented a portion of the purchase price of Grove Metal. Mary Carter also in good faith believed at the time of her draw request,

> based on the facts known to her and on the advice of her counsel, that Allrite Sheetmetal had wrongfully attempted to avoid its obligations under that agreement by a less than arms-length transfer of Allrite Sheetmetal's assets to Allrite Fabricating.

That Conclusion, as a matter of law, erred because the law in Illinois and elsewhere in the United States, is that a draw on a letter of credit requires strict compliance with the terms of the letter of credit. In that same Conclusion, the Court erred further in applying a rationale of casual compliance or partial compliance with the terms of a letter of credit and permitted a calculation on a *per diem* basis to constitute a strict compliance. No evidence as to the exact calculations *per se* was ever produced, and Kwiat's testimony, both in the deposition included in a refused exhibit, as well as his testimony on the witness stand, is that in any event he did not furnish the information to Mr. Mendelsohn, who signed the draft presented to the Bank.

The Court's Conclusion set forth on page 27 that:

> nothing in the nature of a letter of credit precludes a draw request being based on such a calculation, especially under these circumstances, as issuers and the Courts are not to be drawn into disputes over the exact amount due pursuant to the underlying transaction.

is in direct conflict with the law in Illinois, and specifically with *Mount Prospect State Bank v. Marine*

Midland Bank, 121 Ill.App.3d 295, 459 N.E.2d 979 (Ill. App. 1 Dist., 1983), which is to the exact contrary.

28. The Court in entering the Judgment, provided at Paragraph 2 of its Order, Page 29:

> The Bank of Commerce is ordered to honor Mary Carter's draw request and to immediately pay her the amount of $143,495.28.

And the Court further ordered, however, at Paragraph 4 (Page 30):

> In the event of an appeal or other stay issued with regard to the payment ordered in Paragraph 2 above, the Bank of Commerce is hereby enjoined from releasing the funds held in escrow to guarantee the payment of this letter of credit, previously listed as Certificate of Deposit #32239 until further order of the Court.

According to Paragraph 6 of the Order, the Court made the finding that the Order was entered pursuant to Supreme Court Rule 304(a) with an explicit finding that there was no just reason to delay enforcement or appeal of the order.

The *status quo* order should remain in effect until the final conclusion of this suit. The Estate of Gordon Carter, Deceased, is without assets and the collateral securing the Letter of Credit is the Bank's own Certificate of Deposit in an amount in excess of the order.

WHEREFORE PLAINTIFF ALLRITE SHEET-METAL PRAYS THAT THIS COURT:

1. Grant a new trial, a rehearing or a retrial in order to cure the errors of fact and law described above or, in the alternative,

2. That the Judgment heretofore entered directing the Bank of Commerce to pay the sum of $143,495.28 to Mary Carter be modified and reduced to the only sum supported by the evidence, to wit: $8,525.

3. In the event the Bank of Commerce pays the $143,495.28 claimed by Carter, in view of the status quo Order already in place and the exhibits of record showing that there are no assets against which a recovery could be had in the event of a reversal by the Appellate Court, the Court should direct that said funds be deposited with the Clerk of this Court until such time as this matter is finally disposed of and becomes final upon appeal.

4. In addition to the relief set forth above, Movant prays that the Court adheres to the statutory and Constitutional issues set forth above with regard to the legal effect limiting this Court's jurisdiction *ab initio* over Allrite Sheetmetal, Inc. by reason of the automatic stay as provided for under the Bankruptcy laws referenced above. The Judgment of August 15, 2007, should be vacated.

5. Movant prays for such other, further and different relief as the Court may deem just in all of the circumstances.

Respectfully submitted,
ALLRITE SHEET
METAL, INC.

s/Ralph A. Mantynband

By: /s/ _____
Ralph A. Mantynband
Its attorney

1056558_1

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